This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

3 2044 078 604 543

HARVARD LAW LIBRARY

Wisconsin. Supreme Court
Dly 24
c

WISCONSIN REPORTS

139

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

MARCH 30—JUNE 3, 1909

PREPARED AND EDITED FOR THE REPORTER
BY CHARLES F. LAMB
FREDERIC K. CONOVER
OFFICIAL REPORTER

CHICAGO
CALLAGHAN AND COMPANY
1909

COPYRIGHT, 1909,
BY JAMES A. FREAR,
SECRETARY OF STATE OF THE STATE OF WISCONSIN,
For the benefit of the people of said state.

MAY 10 1910

STATE JOURNAL PRINTING COMPANY,
PRINTERS AND STEREOTYPERS,
MADISON, WIS.

JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME

JOHN B. WINSLOW
Ex officio CHIEF JUSTICE
ROUJET D. MARSHALL
JOSHUA ERIC DODGE
ROBERT G. SIEBECKER
JAMES C. KERWIN
WILLIAM H. TIMLIN
JOHN BARNES

Attorney General - FRANK L. GILBERT

Clerk - - - CLARENCE KELLOGG

MEMORANDUM.

Mr. Chief Justice WINSLOW took no part in the decision of those cases which are reported herein on pages 1–107, pages 115–246, pages 281–356, and pages 367–383.

TABLE

OF

CASES REPORTED.

American Bank Trust Co., Hemenway v. *399*
American States Security Co. v. Milwaukee N. R. Co. *199*

Terms of court: Regular and special terms: Appeal and error: Exceptions to instructions: Time to present: Statutes: Eminent domain: Railroad right of way: Compensation: Instructions to jury: "Fair market value:" Harmless error: Trial: View: Competency as evidence: Evidence: Values: Sales of other property: Admission of evidence: Preliminary questions

Antigo, City of, Kuehn v. *132*
Appleby, State ex rel. Brown v. *195*
Armour & Co., Hasbrouck v. *357*
Arnold, Williams v. *177*
Avenarius v. Kornely *247*

Trade-marks and trade-names: Names subject to ownership: Infringement: Actions: Expiration of patent: Effect: Abandonment: Nature of right: Evidence: Foreign trade-marks: Registry in United States: Protection: What law governs: Laches.

Barry, Hackley National Bank v. *96*
Bayfield County, German National Bank v. *398*
Bayfield County, Lamoreux v. *394, 398*
Beals v. State *544*

Constitutional law: Distribution of governmental powers: Judicial powers: Assessment of inheritance tax: Recovery of tax paid: Construction of provisions of inheritance tax law: Taxation: Nature and power: Extent of power: Uniformity of taxation.

Beck, State ex rel. Ohlenforst v. *37*
Beck Co. v. City of Milwaukee *340*
Beecher, Hemenway v. *399*

Bieri v. Fonger 150

Trespass: Possession by wife: Entering dwelling house: Pleading: Sufficiency of complaint: Amendment to conform to proof: Presumption of amendment on appeal.

Blanding, Lemma v. 156
Board of School Directors, Rogers v. 143
Board of School Directors, Rogers-Ruger Co. v. 135
Board of School Directors, Ruger v. 144
Boring, Ott v. 403
Brazee, State ex rel. Cooper v. 538
Bromley v. State 57
Brown, State ex rel., v. Appleby 195
Bucher v. Wisconsin Central R. Co. 597

Railroads: Master and servant: Injuries to brakeman: Contributory negligence: Assumption of risk: Questions for jury: Failure to submit: Trial: Special verdict: Failure to request submission of questions: Appeal and error: Assignments of error: Witnesses: Competency: Experts: Osteopaths: Verdict based on opinion evidence: Conclusiveness: Damages based on sexual impotence: Duty of court: Effect of expert testimony as to personal injuries: Weight and sufficiency of expert evidence: Excessive damages.

Budzisz, Illinois Steel Co. v. 281
Burton, Mueller v. 384

Casper, Klabunde v. 491
C. Beck Co. v. City of Milwaukee 340

Municipal corporations: Charter authority: Ordinances: Constitutional law: Class legislation: Violation of ordinances: Enforcement: Exercise of power to pass ordinances: Construction of ordinances: Delegation of legislative power: Exercise of delegated powers: "Beach:" "Shore:" Injunction: Grounds: Navigable waters: Lands under water: Ownership.

Chicago & Northwestern R. Co., Steber v. 10
Clancy, Duluth Music Co. v. 189
Cleary, Estate of: Cleary v. Cleary 500

Alteration of instruments: Evidence: Appeal and error: Review: Questions of fact: Trial by court: Findings, when disturbed: Admission of incompetent evidence: Harmless error.

Cooper, State ex rel., v. Brazee 538

Damman v. City of Milwaukee 356
Davis v. Williams 8
Mortgages: Leasehold interest: Foreclosure: Purchasers assuming mortgage.

De Blasio v. State 534
Assault regardless of human life: Admissibility of evidence.

Dickinson v. Smith 1
Ejectment: New trial: Undertaking: Justification of sureties: Failure to pay costs not taxed: Extension of time: Amending defective undertaking after the year.

Drake, Schoette v. 18
Duluth Log Co. v. Town of Hawthorne 170
Taxation: Remedies for wrongful enforcement: Injunction: Pleading.

Duluth Music Co. v. Clancy 189
Commerce: Interstate commerce: Foreign corporations: Contracts: Validity: Statutory inhibitions: Conditional sales: Rescission: Conditions precedent: Tender: Replevin.

Du Pont de Nemours Powder Co., Herring v. 412

Eastern Railway Co. of Minnesota, Lundberg v. 161
E. I. Du Pont de Nemours Powder Co., Herring v. 412

Fidelity & Casualty Co. of New York, Schiefelbein v. 612
First National Bank of Shawano v. Miller 126
Bills and notes: Construction: Attorney's fees: Negotiability: Certainty as to amount: Statutory provisions: Negotiable Instrument Law: Notice of dishonor: Time: Sufficiency.

Flanders v. Washburn Land Co. 390
Tax titles: Quieting title of owner: Limitation of actions: "Vacant or unoccupied:" Necessity of payment or tender of taxes paid by tax-title claimant.

Fond du Lac, City of, McMillan v. 367
Fonger, Bieri v. 150
Franck v. Stout 223
Landlord and tenant: Contract to insure: Breach: Measure of damages: Evidence: New trial: Newly discovered evidence: Cumulative evidence: Pleading: Amendment: Withdrawal of count: Costs: Discretion.

German National Bank v. Bayfield County 398
Goldberg, Smith v. 423
Gould v. Merrill Railway & Lighting Co. 433

Appeal and error: Estoppel to allege error: Drawing jury: Refusal to discharge jury: Harmless error: Street railroads: Negligence: Pleading: Injuries to persons using the street: Duty of motorman: Negligence of motorman: Gross negligence: Questions for jury: Proximate cause: Instructions to jury: Notice of injury: Amendment of answer: Requests for instructions: Admission and exclusion of evidence: Duplication of damages: Measure of damages: Domestic animals: Bill of costs: Items.

Gray v. Northern Pacific R. Co. 419

Railroads: Injuries to employees: Scope of employment: Operation of locomotive: Negligence of engineer: Sufficiency of evidence: Contributory negligence.

Great Northern R. Co., Keeley v. 448

Hackley National Bank of Muskegon v. Barry 96

Bills and notes: Conflict of laws: Signing on back before delivery: Indorser or joint maker? Evidence of intent.

Harsen v. Northern Pacific R. Co. 186

Master and servant: Injuries to servant: Care required of foreman: Negligence: Questions for jury: Anticipation of injury.

Hasbrouck v. Armour & Co. 357

Appeal and error: Theory of cause: Review: Action: Joinder of causes of action: Pleading: Construction of allegations: Legal conclusions: "Negligence" defined: Breach of duty: Liability: Guaranty: Warranty.

Hawthorne, Duluth Log Co. v. 170
Hayes, Petition of 163

Municipal corporations: Courts: Jurisdiction: Vacating streets.

Haynes v. Kenosha Electric R. Co. 227

Street railways: Contracts: Construction: Mortgages: Property included: Construction contract: Ownership of material: Consideration for bond issue: Corporations: Stocks: Bonds: Illegal issue: Validity: Statutes: Construction: Foreclosure: Judgment.

Heber v. Estate of Heber 472

Action: Waiver of tort: Trover and conversion: Scope of remedy: Trial of questions of title: Executors and administrators: Right

to prosecute actions: Pleading: Defects: Waiver: Claims: Value of services: Evidence: Conclusiveness: Gifts: Presumptions: Appeal and error: Findings, when disturbed: Payment as a defense: Necessity of pleading: Immaterial error.

Heiden, State v. 519

Hemenway v. Beecher and American Bank Trust Co. 399

Novation: Essential elements: Substitution of debtor: Judgments: Pleading: Sufficiency to charge new debtor.

Herring v. E. I. Du Pont de Nemours Powder Co. 412

Master and servant: Injuries to servant: Negligence: Evidence: Concurrent negligence of master and fellow-servant: Assumption of risk: Contributory negligence: Printed case: Costs.

Heyl, State ex rel., v. Hinkel 41

Heyl & Patterson, Sufferling v. 510

Hinkel, State ex rel. Heyl v. 41

Hinkel, State ex rel. Wisconsin Trust Co. v. 41

Hoag v. Nanstad 455

Appeal and error: Insufficient assignment of error: Review: Questions of fact: Conclusiveness of court's findings.

Homestead Land Co. v. Saveland 663

Mortgages: Foreclosure: Personal liability: Judgment: Appeal and error: Review: Appeal from final judgment: Vacation of judgment: New trial: Order: Effect.

Howard v. State 529

Burglary: Statutory offense: Statutes: Construction: "Any other building:" Criminal law and practice: Trial: Former conviction: Error in admission of evidence: Reversal: Mandate.

Illinois Steel Co. v. Budzisz 281

Title: Adverse possession: Statutes: Landlord and tenant: Transition of title: Possession of purchaser from tenant: Trespass: Disseisin: Presumptions: Rules of evidence: Estoppel.

Illinois Steel Co. v. Paczocha 23

Adverse possession: Tacking possessions: Privity: Hostile claim: Evidence: Parol evidence affecting writings: Finding of fact: Harmless errors: Leases: Presumption as to signature: Specific denial: Disseisin by surveys: Explanatory evidence: Limiting effect: Instructions to jury: Special verdict: Burden of proof: Informing jury as to effect of answers.

Jacobs, Will of 457

Appeal and error: Harmless error: Erroneous admission or rejection of evidence: Conclusiveness of findings.

Jirachek v. Milwaukee Electric R. & L. Co. 505

Street railways: Negligence: Starting car while passenger is alighting: Sufficiency of special verdict: Finding as to negligence: Trial: Instructions to jury: Credibility of witnesses: Requests embraced in charge: Instructions applicable to the evidence: Burden of proof as to damages.

Johanson v. Webster Manufacturing Co. 181

Master and servant: Injuries to servant: Negligence: Rules and regulations governing conduct of servants: Evidence: Elements of negligence: Contributory negligence: Assumption of risk: Printed case: Costs.

Johnson v. Vickers 145

Assignments: Contracts assignable: Action by assignee: Evidence: Issues: Pleading: General denial: Defects in pleading: Waiver: Demurrer: Estoppel.

Keeley v. Great Northern R. Co. 448

Parties: Joint tortfeasors: Witnesses: Cross-examination: Rebuttal: Railroads: Injuries to employees: Negligence of engineer: Instructions to jury: Damages: Measure: New trial: Grounds: Perjury of witness: Death: Statutory limit of damages: Amendment of statute: Retroactive construction: Appeal and error: Modification and affirmance: Costs.

Kenosha Electric R. Co., Haynes v. 227

Klabunde v. Casper 491

Deeds: Death of grantor: Delivery to third person for grantee: Sufficiency.

Kornely, Avenarius v. 247

Krier v. Milwaukee Northern R. Co. 207

Evidence: Trial: Expert witnesses: Mode of examination: Eminent domain: Compensation. Appeal and error: Invited error: Waiver: Right to compensation: Values: Excessive damages.

Kuehn v. City of Antigo 132

Taxation: "Growing crops:" Ginseng: Statutes: Construction.

Kuich v. Milwaukee Bag Co. 101

Master and servant: Personal injuries: Negligence: Failure to warn: Machinery: Guards: Statutes.

Lamoreux v. Bayfield County 394, 398

Action to annul tax: Tax certificates: Purchase *pendente lite:* Notice: *Lis pendens:* Void tax certificates: Purchase by landowner: Recovery of money paid.

Lemma v. Blanding 156

Appeal and error: Review: Findings, when disturbed: Evidence: Documentary evidence: Books of account: Time of making entries: Partnership contracts: Construction: Accounting: Interest: Affirmance or reversal: Correction of errors.

Lichter v. Thiers 481

Wills: Construction: Title devised: Codicil: "Other disposition:" Beneficiaries: Adopted children: Status: Remainder to "children" of devisee: Assignment of estate.

Loewenbach v. City of Milwaukee 49

Municipal corporations: Special assessments: Street improvements: Milwaukee charter construed: "Paving" includes repaving: Property assessable: Arbitrary assessment.

Lundberg v. Eastern R. Co. of Minnesota 161

Eminent domain: Invalid condemnation proceedings: Injunction before entry: Dissolution: Appeal and error: Prejudicial error.

McMillan v. City of Fond du Lac 367

Municipal corporations: Illegal contracts: Taxpayer's action: Paving contracts: Injunction.

Merrill Railway & Lighting Co., Gould v. 433

Miller, First National Bank v. 126

Miller v. State 57

CRIMINAL LAW AND PRACTICE. (1-5) Continuance: Absence of witness: Counter affidavits: Denial on conditions: Discretion: Review on appeal. (6-18, 22) Instructions to jury: Form and language: Discretion: Presumption of innocence: Self-defense: "Reasonable doubt:" Conviction of lesser offense: Harmless errors. (19-21, 23, 24) Evidence: Conspiracy: Declarations: Sufficiency. (25, 26) Arrest of judgment: Motion for new trial.

Millis v. Thayer 480

Milwaukee Bag Co., Kuich v. 101

Milwaukee, City of, C. Beck Co. v. *340*
Milwaukee, City of, Damman v. *356*
Milwaukee, City of, Loewenbach v. *49*
Milwaukee Electric R. & L. Co., Jirachek v. *505*
Milwaukee Free Press Co., Pfister v. *627*
Milwaukee Northern R. Co., American States S. Co. v. *199*
Milwaukee Northern R. Co., Krier v. *207*
Mueller v. Burton *384*

Building contracts: Incomplete performance: Necessity of showing value on substantial performance.

Nanstad, Hoag v. *455*
Newald, Van Eps v. *129*
Northern Pacific R. Co., Gray v. *419*
Northern Pacific R. Co., Harsen v. *186*

Ohlenforst, State ex rel., v. Beck *37*
Ott v. Boring *403*

Reference: Review by court: Conclusiveness of findings: Appeal and error: Findings of trial court, when disturbed: "Clear preponderance:" Partnership: Dissolution: Accounting: Valuing assets: Evidence: Good will: Elements.

Pabst, State v. *561*
Paczocha, Illinois Steel Co. v. *23*
Patrick v. Patrick *463*

Divorce: Judgments: Conclusiveness of adjudication: Pleading: Issues raised by general denial.

Pfister v. Milwaukee Free Press Co. *627*

Libel and slander: Pleading: Privilege: Mitigating circumstances: Newspapers: Private citizens: Fair criticism: Proper comment: Publication by other papers: Appeal and error: Harmless error: Justification: Innuendo: Different meanings: Meaning of the writer: Instructions to jury: Common knowledge: Notoriety: Mitigation of damages: Character of plaintiff: Exclusion of evidence: Acts of corporation: Managing editor of newspaper: Ratification: Exemplary damages: Admissibility of evidence: Malice: Collateral issues: Testimony taken before grand jury: Separate causes of action: General verdict, when proper: Necessity of exceptions: Failure to instruct jury: Necessity of requests for instructions: Excessive damages.

Philler v. Waukesha County 211

Witnesses: Compensation: Experts: Counties: Criminal cases: Liability of county for witness fees: Defendant's experts.

Rayworth, Schoblasky v. 115

Rogers v. Board of School Directors 143

Schools and school districts: Orders: Validity: Burden of proof.

Rogers-Ruger Co. v. Board of School Directors 135

Pleading: Allegations on information and belief: Oral demurrer: Schools and school districts: Meetings: Notice: Proof of failure to notify: Evidence: School boards: Auditing accounts: Issuing orders: Trial: Reception of evidence: Invalid orders.

Ruger v. Board of School Directors 144

Salzman, Steinberg v. 118

Saveland, Homestead Land Co. v. 663

Schiefelbein v. Fidelity & Casualty Co. of New York 612

Appeal and error: Review: Sufficiency of evidence: Release: Impeachment.

Schmitt v. Seefeld 459

Master and servant: Guarding machinery: Statutes: Construction: Safe place to work: Obligation of master: Contributory negligence.

Schoblasky v. Rayworth 115

Contracts: Parol modification of written contract: Escrow.

Schoette v. Drake 18

False imprisonment: Justification for arrest: Delay in bringing before magistrate: Questions for jury: Evidence: Admissibility: Original pleading as admission.

School Directors, Rogers v. 143

School Directors, Rogers-Ruger Co. v. 135

School Directors, Ruger v. 144

Schrupp, Washington County v. 219

Seefeld, Schmidt v. 459

Smith, Dickinson v. 1

Smith v. Goldberg 423

Sales: Contracts: Construction: Ambiguity: Breach of contract: Negotiations for settlement: Notice of breach: Damages: Evidence: Duty to return property: Instructions to jury.

Southwestern Slate Co. v. Stephens *616*

Appeal and error: Findings, when disturbed: Foreign corporations: Wisconsin contracts: Offer to sell stock: Acceptance: Completed contract: Rights of subscribers: Void contracts: "Personal liability" of corporation: Commerce: Interstate commerce: Contracting and transacting business in Wisconsin: Amendment of statutes.

Sparks v. Wisconsin Central R. Co. *108*

Railroads: Personal injuries to employees: Negligence: Evidence: Car inspector: Master and servant: Rules governing servants: Fellow-servants: Statutes: Proximate cause: Anticipation of probable consequences: Contributory negligence: Printed case: Costs

State, Beats v. *544*

State, Bromley v. *57*

State, De Blazio v. *534*

State v. Heiden *519*

Criminal law and practice: Indictment and information: Duplicity: Certified questions: Compliance with statute: Embezzlement: Sufficiency of verdict: Instructions to jury: Ignoring evidence.

State, Howard v. *529*

State, Miller v. *57*

State v. Pabst *561*

Taxation: Inheritance taxes: Constitutional law: Equal protection of laws: Statutes: Construction by courts of state from which adopted: Time of accrual of tax: Appraisement: Rate of taxation: Contingent interests: Defeasible interests: Transfers subject to tax: "In contemplation of death:" Witnesses: Competency: Privileged communications: Information acquired by a physician: Documentary evidence: Public records: Official certificates: Certificate of death: Values: Corporate stock: Appeal and error: Findings, when disturbed: Penalties: "Necessary litigation or other unavoidable delay."

State ex rel. Brown v. Appleby *195*

Municipal corporations: Police officers: Appointment: "Chief of police:" "City marshal:" "Captain of police."

State ex rel. Cooper v. Brazee *538*

Courts: Jurisdiction of supreme court: *Mandamus:* Grounds: Existence of another remedy.

State ex rel. Heyl v. Hinkel 41

Taxation: Mortgages on land, with other security.

State ex rel. Ohlenforst v. Beck 37

Statutes: Amendment: Retained provisions: Bakeries: Right to license.

State ex rel. Wisconsin Trust Co. v. Hinkel 41

Steber v. Chicago & Northwestern R. Co. 10

Railroads: Negligence: Killing of car-repairer: Duty of employer to guard against dangers: Rules and regulations: Signal flag on track: Questions for jury: Special verdict: Specific questions: Harmless error: Instructions to jury: Credibility of witnesses: Curing error.

Steinberg v. Salzman 118

Limitation of actions: Infants: Adverse possession: Color of title: Good faith: Homestead: Actions for accounting: Executors and administrators: Sales of real estate: Liability of purchaser: Rights of heirs: Costs: Printed case.

Stephens, Southwestern Slate Co. v. 616

Stout, Franck v. 223

Sufferling v. Heyl & Patterson 510

Master and servant: Fellow-servants: Subcontractor's servants: Negligence: Appeal and error: Remarks of court: Harmless error: Instructions to jury: Trial: Special verdict: Special interrogatories: Ordinary care: Damages: Burden of proof.

Thayer, Millis v. 480

Thiers, Lichter v. 481

Thomas v. Williams 467

Assault and battery: Civil liability: Trial: Instructions to jury: Requests for instructions: Omission to define terms: Exemplary damages: Evidence: Pecuniary condition of defendant: Compensatory damages.

Tobin v. Tobin 494

Gifts: Requisites: Intent: Delivery: Acceptance: Mortgages: Nature: Assignment: Payment: Extinguishment: Trusts and trustees: Resulting trusts: Statutes: Construction: "Grant."

Tracy, Wahl v. 668

Van Eps v. Newald *129*

Appeal and error: Proceedings in record: Exceptions: Review of findings: Pleadings: Admissions in answer: Alteration of note: Effect upon mortgage: Rights of parties: Chattel mortgages: Replevin: Evidence.

Vickers, Johnson v. *145*

Wahl v. Tracy *668*

Brokers: Duties: Diligence: Good faith: Purchase of stock: Authority: Revocation: Margins: Breach of authority: Damages.

Washburn Land Co., Flanders v. *390*

Washington County v. Schrupp *219*

Courts: Jurisdiction: Claims for maintenance of insane persons: County courts: Circuit courts.

Waukesha County, Philler v. *211*

Webster Manufacturing Co., Johanson v. *181*

Williams v. Arnold *177*

Entire contracts: Breach: Pleading: Amendment to conform to proofs: Excessive damages.

Williams, Davis v. *8*

Williams, Thomas v. *467*

Wisconsin Central R. Co., Bucher v. *597*

Wisconsin Central R. Co., Sparks v. *108*

Wisconsin Trust Co., State ex rel., v. Hinkel *41*

CITATIONS BY THE COURT.

CASES CITED.

Ackerman v. Lyman 20 W. 454 336
Ah Lee, *In re*, 5 Fed. 899 - 298
A. H. Stange Co. v. Merrill 134 W. 514 - - - 173, 176, 355
Aldrich v. Griffith 66 Vt. 390 298
A. Leschen & Sons R. Co. v. Broderick & B. R. Co. 123 Fed. 149 - - - - - 269
Allen v. Allen 114 W. 615 - 45
—— v. Clausen 114 W. 244 235, 238
—— v. Milwaukee 128 W. 678 626
—— v. Murray 87 W. 41 - 17, 83
—— v. News P. Co. 81 W. 120 655
—— v. Reilly 15 Neb. 452 - 68
Allmendinger v. McHie 189 Ill. 308 - - - - - - 313
American States S. Co. v. M. N. R. Co. 139 W. 199 - - 208
Anderson, *In re*, 69 Neb. 686 - 349
Anderson v. Chicago B. Co. 127 W. 273 - - - 444, 471
—— v. M., St. P. & S. S. M. R. Co. 103 Minn. 184 - - 217
—— v. State 41 W. 430 - - 85
—— v. —— 133 W. 601 - - 79
Andrews v. Durant 11 N. Y. 35 237
Apollon, The, 9 Wheat. 362 - 270
Ark. Valley S. Co. v. Belden M. Co. 127 U. S. 379 - - 148
Ashland L. Co. v. Detroit S. Co. 114 W. 66 - - - 193
Att'y Gen. v. Blossom 1 W. 317 540
—— v. Railroad Cos. 35 W. 425 540

Babcock v. Fond du Lac 58 W. 230 - - - - - - 397
Badger P. Co. v. Rose 95 W. 145 - - - - - - 625
Bailey v. Costello 94 W. 87 - 667
Bain v. N. P. R. Co. 120 W. 412 - - - 110, 112, 113
Baines v. Janesville 100 W. 369 169
Baker v. State 80 W. 416 - 89
Banderob v. Wis. Cent. R. Co. 133 W. 249 - - - - - 35
Barker v. M. & L. W. R. Co. 59 W. 364 - - - - 203, 209
Barnhizel v. Ferrell 47 Ind. 335 487, 489
Barrus v. Phaneuf 166 Mass. 123 - - - - - 216, 217
Barth v. Graf 101 W. 27 - - 475
Bartlett v. Ambrose 78 Fed. 839 - - - - - - 298
Barton v. McKay 36 Neb. 632 65
Bass v. C. & N. W. R. Co. 42 W. 654 - - - - - 655, 656
Batcheller v. Thomson 93 Fed. 660 - - - - - - 268
Bates v. Winters 138 W. 673 - 493
Bathrick v. Detroit P. & T. Co. 50 Mich. 629 - - - 646
Batz v. Woerpel 113 W. 442 - 297
Bauer v. Richter 103 W. 412 - 453
Baxter v. C. & N. W. R. Co. 104 W. 307 - - - 606, 612
Beadleston & Woerz v. Cooke B. Co. 74 Fed. 229 - - 262
Beals v. State 139 W. 544 583, 584
Beard v. U. S. 158 U. S. 550 - 76
Beaver v. Beaver 117 N. Y. 421 498
Beck Co. v. Milwaukee 139 W. 340 - - 351, 356, 540, 543
Bedlow v. New York F. D. D. Co. 112 N. Y. 263 294, 306, 328, 331
Bell v. Morrison 1 Pet. 351 - 338
—— v. Peterson 105 W. 607 - 396
Bentley v. Adams 92 W. 386 - 40
Benton, *In re* Estate of, 234 Ill. 366 - - - - - - 591
Betts v. Shotton 27 W. 667 - 124
Bierbrauer v. Kuhnel 122 W. 306 - - - - - - 406
Bieri v. Fonger 139 W. 150 - 175
Bigelow v. Danielson 102 W. 470 - - - - - - 516

Bishop v. Belle City St. R. Co. 92 W. 139 - - - - - 442
—— v. Bleyer 105 W. 330 28, 36
—— v. Weber 139 Mass. 411 - 364
Black v. State 113 W. 205 348, 553
Blackman v. Arnold 113 W. 487 - - - - - - 99
Blair v. Comm. 25 Grat. 850 - 544
Blakely, Will of, 48 W. 294 - 607
Blight's Lessee v. Rochester 7 Wheat. 535 - - - - - 329
Bloch v. Am. Ins. Co. 132 W. 150 - - - - - - 601
Block v. Schwartz 27 Utah 387 559
Blodgett v. Stowell 189 Mass. 142 - - - - - 488, 489
Blood B. Co. v. Cooper 83 Ga. 457 - - - - - - 364
Blunt v. Walker 11 W. 334 - 625
Bohn Mfg. Co. v. Reif 116 W. 471 - - - - - - 401
Boldt v. State 72 W. 7 - - 662
Boorman v. N. W. Mut. R. Asso. 90 W. 144 - - - 607
Boothby v. Scales 27 W. 626 - 428
Boston Ice Co. v. Potter 123 Mass. 28 - - - - - 148
Bowdish v. Dubuque 38 Iowa 341 - - - - - - 311
Boyd v. Milwaukee 92 W. 456 51
Brader v. Brader 110 W. 423 - 31
Bradley v. Cramer 59 W. 309 651
Bradstreet v. Huntington 5 Pet. 402 - - 328, 329, 336
Bradt v. Church 110 N. Y. 537 301, 306, 327, 331
Bragdon v. Perkins C. Co. 87 Fed. 109 - - - - - 364
Brandt v. Milwaukee 69 W. 386 168, 169
Braun v. Wis. R. Co. 92 W. 245 118
Bray v. Miles 23 Ind. App. 432 488
Bremridge v. Latimer 10 L. T. Rep. 816 - - - - - 645
Brewster v. Carmichael 39 W. 456 - - - - - - 454
Briggs v. Hiles 79 W. 571 - 406
—— v. N. Y. C. & H. R. R. Co. 177 N. Y. 59 - - - 611
Bright v. Barnett & R. Co. 88 W. 299 - - - - - - 364
Brinkman v. Jones 44 W. 498 499
Brittingham & H. L. Co. v. Manson 108 W. 221 - - 99
Brooks v. West Springfield 193 Mass. 190 - - - - - 47
Brown v. Cohn 95 W. 90 - 396
—— v. Everhard 52 W. 205 - 117
—— v. State 65 Ga. 332 - - 68
Bryan v. Adler 97 W. 124 - 655
Bucher v. Wis. Cent. R. Co. 139 W. 597 - - - - - 112
Buckman v. State 59 Ind. 1 - 216
Buckstaff v. Hicks 94 W. 34 - 640
Buel v. State 104 W. 132 77, 81, 82, 84
Burnett v. Freeman 125 Mo. App. 683 - - - - - 216
—— v. Phalon 9 Bosw. 192 - 265
Burnham v. Norton 100 W. 8 222
Burrage v. Briggs 120 Mass. 103 487
Burt v. Advertiser N. Co. 154 Mass. 238 - - - - - 640
Butler v. State 102 W. 364 - 86
Butterfield v. Sawyer 187 Ill. 598 - - - - - - 488

Cahn v. Ladd 94 W. 134 - - 83
Caldwell v. Perkins 93 W. 89 118
Cameron v. Sullivan 15 W. 510 7
Cameron M. & E. Co. v. Anderson 34 Tex. Civ. App. 229 606
Campau v. Lafferty 43 Mich. 429 - - - - - - 311
Campbell v. Shipley 41 Md. 81 308
—— v. Sumner Co. 64 Kan. 376 148
Canal Co. v. Clark 13 Wall. (80 U. S.) 311 - - 260, 261, 274
Candee, S. & Co. v. Deere & Co. 54 Ill. 439 - - - 262
Carborundum Co., *Ex parte*, 118 Off. Gaz. 2250 - - 269
Carmon v. State 18 Ind. 450 - 69
Carpenter v. Comm'rs 56 Minn. 513 - - - - - - 351
Carr v. Carr 52 N. Y. 251 - 499
Carter v. Marshall 72 Ill. 609 311
C. Beck Co. v. Milwaukee 139 W. 340 - - 351, 356, 540, 543
Celluloid Mfg. Co. v. Cellonite Mfg. Co. 32 Fed. 94 - - 281
—— v. Read 47 Fed. 712 - 281
Cerney v. Pawlot 66 W. 262 494, 499, 500
Chaffee Mfg. Co. v. Selchow 131 Fed. 543 - - - 263
Chambers v. Lancaster 160 N. Y. 342 - - - - - - 241
Chesebrough Mfg. Co.'s Trademark, *In re*, 19 Rep. Pat. Cas. (1902) 342 - - - - - 274
Chicago & N. W. R. Co. v. Calumet S. F. 96 Ill. App. 337 606
—— v. —— 194 Ill. 9 - - 606
—— v. State 128 W. 553 - - 44
Chicago P. S. Exch. v. McClaughry 148 Ill. 372 - - 64
Childs v. Nelson 69 W. 125 - 313

Chippewa Valley & S. R. Co. v. C., St. P., M. & O. R. Co. 75 W. 224 - - - - - 381
Church v. Schoonmaker 115 N. Y. 570 - - - 294, 306
Cincinnati, N. O. & T. P. R. Co. v. Citizens' Nat. Bank 24 Weekly Law Bul. 198 - 244
Clapp v. Bromagham 9 Cow. 530 - - - - - - 332
Clarkson v. Stevens 106 U. S. 505 - - - - - - 237
Clason v. Milwaukee 30 W. 316 - - 347-349, 355, 541
Clippinger v. Hepbaugh 5 Watts & S. 315 - - - 381
Clithero v. Fenner 122 W. 356 28, 30, 297
Closuit v. John Arpin L. Co. 130 W. 258 - - - - 28, 30
Cobb v. Simon 119 W. 597 - 656
Cochran v. Melendy 59 W. 207 651
Cockburn v. Ashland L. Co. 54 W. 619 - - - - - 675
Cole v. McBrown 22 Ind. 252 239
Coleman v. MacLennan (Kan.) 98 Pac. 281 - - - - - 641
Collins v. Godefroy 1 B. & Ad. 950 - - - - - - 216
—— v. Janesville 99 W. 464 - 608
Collins Co. v. Cowen 3 K. & J. 428 - - - - - - 262
Comerford v. State 23 Ohio St. 599 - - - - - - 69
Comm. v. Cutler 156 Mass. 52 349
—— v. Donovan 99 Mass. 425 69
—— v. Nancrede 32 Pa. St. 389 487
—— v. Tewksbury 11 Met. 55 355
Compty v. C. H. Starke D. & D. Co. 129 W. 622 - 112, 184
Conqueror, The, 166 U. S. 110 606
Conrad v. Ellington 104 W. 367 - - - - - - 610
Cooper v. Smith 8 Watts 536 - 307
Cornell v. State 104 W. 527 522-3
Cottolene Case 64 Fed. 133 - 280
Coughtry v. Globe W. Co. 56 N. Y. 124 - - - - - 364
Cowan v. C., M. & St. P. R. Co. 80 W. 284 - - - 416
Cowles v. Neillsville 137 W. 384 - - - - - 541, 543
Craig v. Miller 6 Ky. 440 - 149
Craker v. C. & N. W. R. Co. 36 W. 657 - - - - - 655
Crawford v. Christian 102 W. 51 - - - - - - 607
Cromwell v. County of Sac 94 U. S. 351 - - - - 465
Cross v. Evans 167 U. S. 60 - 528
Cruikshank v. Gordon 118 N. Y. 178 - - - - - - 660
Currie v. Michie 123 W. 120 - 458
Cushenberry v. McMurray 27 Kan. 328 - - - - - 65
Cutler v. State 42 Ind. 244 - 65
Cutts v. Hussey 15 Me. 237 - 350

Dabold v. Chronicle P. Co. 107 W. 357 - - - - - 652
Dadirrian v. Yacubian 72 Fed. 1010 - - - - - - 279
—— v. —— 90 Fed. 812 - - 279
—— v. —— 98 Fed. 872 - - 279
Daggett v. Reas 79 W. 60 - 393
Dahlke v. Ill. S. Co. 100 W. 431 - - - - - - 185
Dakhyl v. Labouchere 77 L. J. K. B. 728 - - - 641
Damman v. Milwaukee 139 W. 356 - - - - - 351, 352
Dapper v. Milwaukee 107 W. 88 - - - - - - 184
Davis v. Krug 95 Ind. 1 - - 489
Davis & R. B. & M. Co. v. Riverside B. & C. Co. 84 W. 262 67
Davis & Sons v. Shepstone L. R. 11 App. Cas. 187 - 640
Davy v. Kelley 66 W. 452 - 99
Day v. Roth 18 N. Y. 448 - 499
Dean v. State 89 Ala. 46 - - 69
DeArman v. State 77 Ala. 10 - 69
De Brimont v. Penniman 10 Blatchf. 436 - - - - 270
Delaplaine v. C. & N. W. R. Co. 42 W. 214 - - - 351
Dement, *Ex parte*, 53 Ala. 389 216
Dennison v. Read 3 Dana 586 312
Dessert L. Co. v. Wadleigh 103 W. 318 - - - - - 155
Detroit R. E. I. Co. v. Wayne Circuit Judge 137 Mich 108 168
Diedrich v. N. W. U. R. Co. 42 W. 248 - - - - - 351
Dikeman v. Parrish 6 Pa. St. 210 - - - 309, 327, 330
Dimmey v. W. & E. G. R. Co. 27 W. Va. 32 - - - 68
Distin v. Rose 69 N. Y. 122 659, 660
Dixon v. People 168 Ill. 179 - 216
—— v. Stewart 113 N. C. 410 310
Doane v. Chicago City R. Co. 160 Ill. 22 - - - - 380
Docter v. Hellberg 65 W. 415 314
Dohmen Co. v. Niagara F. Ins. Co. 96 W. 38 - 17, 83, 404, 409
Doyle v. Gill 59 W. 518 - - 142
Draper v. Baker 61 W. 450 - 470

Driver v. W. U. R. Co. 32 W. 569 - - - - - 203, 210
Du Cate v. Brighton 133 W. 628 - - - - - - 438
Dufresne v. Weise 46 W. 290 - 645
Dugal v. Chippewa Falls 101 W. 533 - - - - - - 185
Duluth, S. S. & A. R. Co. v. Douglas Co. 103 W. 75 - 43
Dunbar v. Bittle 7 W. 143 - 406
—— v. Glenn 42 W. 118 264, 265, 267, 268
Dunlap v. Mercer 156 Fed. 545 194
Duthie v. Washburn 87 W. 231 74

Eastern R. Co. v. McCord 136 W. 249 - - - - - - 162
Eastern Wis. R. & L. Co. v. Hackett 135 W. 464 - - 349
Eaton v. McMahon 42 W. 484 100
Edison v. Babka 111 Mich. 235 148
Eggett v. Allen 106 W. 633 - 78
—— v. —— 119 W. 625 - - 470
Ehrmann v. Mayer 57 Md. 612 308
Ellington v. Ellington 103 N. C. 54 - - - - - 298, 313
Elliott v. Edwards 35 N. J. Law 265 - - - - - 237
—— v. Stewart 15 Oreg. 259 - 350
Emerick v. Tavener 9 Grat. 220 303, 304, 327
Emerson v. Nash 124 W. 369 153, 175
Emert v. Missouri 156 U. S. 296 193
Emery v. State 101 W. 627 - 206
Endress v. Shove 110 W. 141 - 408
Enquirer Co. v. Johnston 72 Fed. 443 - - - - - 641
Esch v. C., M. & St. P. R. Co. 72 W. 229 - - 203, 204, 211
Eslinger v. East 100 Ind. 434 - 65
E. T. Kenney Co. v. Anderson (Ky.) 81 S. W. 663 - - 428
European & N. A. R. Co. v. McLeod 16 New Brunswick 3 - 625
Evans v. St. Paul F. & M. Ins. Co. 54 W. 522 - - - - 7
Eviston v. Cramer 47 W. 659 - 651
—— v. —— 57 W. 570 - - 655
Excelsior W. Co. v. Messinger 116 W. 549 - - - - - 99
Eyre v. Jacob 14 Grat. 422 - 559

Faber v. C. Reiss C. Co. 124 W. 554 - - - - - - 185
Fairbank Co. v. Central L. Co. 64 Fed. 133 - - 265, 267, 280
Fairchild v. Fairchild 64 N. Y. 471 - - - - - - 499
Farmers' Nat. Bank v. Sutton Mfg. Co. 52 Fed. 191 - - 128
F. Dohmen Co. v. Niagara F. Ins. Co. 96 W. 38 - 17, 83, 404, 409
Feldschneider v. C., M. & St. P. R. Co. 122 W. 423 - - 111
Field v. Columbet 9 Fed. Cas. 12 - - - - - - - 298
Filber v. Dautermann 26 W. 518 - - - - - - 651
Finkelston v. C., M. & St. P. R. Co. 94 W. 270 - - - 114
Finn v. Wis. River L. Co. 72 W. 546 - - - - - - 392
First Nat. Bank v. G. V. B. Min. Co. 89 Fed. 439 - - 241
—— v. Larsen 60 W. 206 - - 128
Fish Bros. W. Co. v. La Belle W. Works 82 W. 546 - - 265
Fisher v. Otis 3 Pin. 78 - - 499
Fitzgerald v. International F. T. Co. 104 Minn. 138 - - 112
Fitzgerald & M. C. Co. v. Fitzgerald 137 U. S. 98 - - 241
Flinn v. Prairie Co. 60 Ark. 204 216
Forbes v. Hicks 27 Neb. 111 - 22
Ford v. Foster L. R. 7 Ch. 611 268
—— v. Schliessman 107 W. 479 153
Forgy v. Harvey 151 Ind. 507 311
Fox v. Brissac 15 Cal. 223 - 312
Franey v. Warner 96 W. 222 153, 625
Frank v. State 94 W. 211 - 77
Franklin v. Merida 35 Cal. 558 310
Freeland v. Pa. R. Co. 197 Pa. St. 529 - - - - 349, 355
Friend Bros. C. Co. v. Hulbert 98 W. 183 - - - - - 194
Frost v. Meyer 137 W. 255 - 202
Frye v. Highland 109 W. 292 297
Fullerton v. Spring 3 W. 667 - 40

Gaertner v. Bues 109 W. 165 - 655
Gagan v. Janesville 106 W. 662 184
Galloway v. Week 54 W. 604 237
Galveston, H. & H. R. Co. v. Cowdrey 11 Wall. 459 - - 239
Galveston R. Co. v. Powers (Tex.) 105 S. W. 491 - - 611
Gandy v. State 27 Neb. 707 - 65
Gaynor v. Blewett 86 W. 399 - 666
Gear v. Shaw 1 Pin. 608 - - 66
George v. Skivington L. R. 5 Exch. 1 - - - - - 363
George, Weeks & Co. v. Swafford Bros. 75 Iowa 491 - - 65
Gessler v. Grieb 80 W. 21 279, 280
Gilman v. Brown 115 W. 1 - 36
—— v. Gross 97 W. 224 - - 625

Gilman v. McArdle 99 N. Y. 451 - - - - - - 499
Glascott v. Bragg 111 W. 605 - 487
Glasier v. Nichols 112 Fed. 877 606
Glasscott v. Warner 20 W. 654 222
Glentz v. State 38 W. 549 - 40
Glettler v. Sheboygan L., P. & R. Co. 130 W. 137 - - 442
Gonring v. C., M. & St. P. R. Co. 78 W. 16 - - - 67
Goodman v. State, Meigs (Tenn.) 195 - - - - 69
Gores v. Graff 77 W. 174 - - 471
Graeven v. Dieves 68 W. 317 - 313
Graham v. Moore 4 Serg. & R. 467 - - - - - - 309
—— v. State 50 Ark. 161 - 69
Grant v. Keystone L. Co. 119 W. 229 - - - - - - 416
Gray v. Brooklyn U. P. Co. 35 App. Div. 286 - - - 641
Green v. Kennedy 48 N. Y. 653 21
Greene v. Louisville R. Co. 7 Am. & Eng. Ann. Cas. 1126 - 443
Greeno v. Munson 9 Vt. 37 328
Greer v. Chartiers R. Co. 96 Pa. St. 391 - - - - 625
Gregory v. Stryker 2 Denio 628 237
Groth v. Thomann 110 W. 488 106
Grotjan v. Rice 124 W. 253 - 518
Grunert v. Spalding 104 W. 193 465
Guenther v. State 137 W. 183 527
Guetzkow Bros. Co. v. A. H. Andrews & Co. 92 W. 214 406, 675
Gumz v. Giegling 108 Mich. 295 100
Guth v. Lubach 73 W. 131 - 651

Hacker v. Heiney 111 W. 313 640
Hadley v. Baxendale 9 Exch. 341 - - - - - 432, 675
Hall v. Ætna Mfg. Co. 30 Iowa 215 - - - - - - - 428
Haney v. Schooner Rosabelle 20 W. 247 - - - 237
Hanley v. Kraftczyk 119 W. 352 - - - - - - 314
Hanlon v. Milwaukee E. R. & L. Co. 118 W. 210 - - 517
Hardt v. C., M. & St. P. R. Co. 130 W. 512 - - - 112
Harker v. Gustin 12 N. J. Law 42 - - - - - - 307
Harrigan v. Gilchrist 121 W. 127 - - - - - - 458
Harris v. Fond du Lac 104 W. 44 - - - - - - - 169
Hart v. Godkin 122 W. 646 17, 83
—— v. Hart 117 W. 639 - - 161
—— v. Moulton 104 W. 349 - 465
Hartwell v. Tefft 19 R. I. 644 488
Hatch v. Lusignan 117 W. 428 123
Hawes v. Shaw 100 Mass. 187 311
Hayes v. C., M. & St. P. R. Co. 131 W. 399 - - - 73, 112
—— v. Frey 54 W. 503 - - 66
Hayward v. Nordberg Mfg. Co. 85 Fed. 4 - - - - 381
Heaven v. Pender L. R. 11 Q. B. Div. 503 - - - - 364
Heer v. Warren-Scharf A. P. Co. 118 W. 57 - - - 443
Hein v. Mildebrandt 134 W. 582 - - - - - - 115
Hier v. Abrahams 82 N. Y. 519 - - - - - - 268
Hill v. Am. S. Co. 107 W. 19 670
Hilliard v. Wis. L. Ins. Co. 137 W. 208 - - - - - 149
Hinz v. Van Dusen 95 W. 503 405
Hitchcock v. Merrick 18 W. 357 - - - - - - 499
Hixon v. Oneida Co. 82 W. 515 - - - - - - 396
Hocking v. Windsor S. Co. 131 W. 532 - - - - - 214
Hohner v. Gratz 50 Fed. 369 - 270
Hole v. Robbins 53 W. 514 487, 489
Holmes v. State 124 W. 133 23, 77
Holzapfel's C. Co. v. Rahtjen's A. C. Co. 183 U. S. 1 - 263, 273
Hope v. Fall Brook C. Co. 3 App. Div. 70 - - - 366
Hopkins v. C., M. & St. P. R. Co. 128 W. 403 - - - 154
Horn v. La Crosse Box Co. 131 W. 384 - - - - - - 106
Houghton v. C., D. & M. R. Co. 47 Iowa 370 - - - - 351
Howard v. Beldenville L. Co. 129 W. 98 - - - 184, 416
—— v. —— 134 W. 644 - - 438
—— v. First Ind. Church 18 Md. 451 - - - - 379
Hughes v. C., St. P., M. & O. R. Co. 126 W. 525 - - 73
—— v. Watt 28 Ark. 153 - 311
Humbert v. Trinity Church 24 Wend. 587 - - - - 332
Humphries v. Davis 100 Ind. 274 - - - - - - 489
Hunt v. Star N. Co. 77 L. J. K. B. 732 - - - - - 641
Hupfer v. Nat. D. Co. 119 W. 417 - - - - - - 31
Huset v. J. I. Case T. M. Co. 120 Fed. 865 - - - 364
Hyde v. State 16 Tex. 445 - 65
Hynes v. Briggs 41 Fed. 468 - 193

Ill. S. Co. v. Bilot 109 W. 418 34, 36, 297, 300, 333
—— v. Budzisz 106 W. 499 28, 36, 297, 313
—— v. —— 115 W. 68 - - 34
—— v. —— 119 W. 580 28, 36, 297
—— v. —— 139 W. 281 - 123–125
—— v. Jeka 119 W. 122 - 28, 30, 34, 36
—— v. —— 123 W. 419 - - 34
Ingalls v. State 48 W. 647 - 532
International T. Co. v. Peterson 133 W. 302 - - - 626
Isham v. Post 141 N. Y. 100 - 670
Ives v. Welden 114 Iowa 476 - 365

Jackson v. Andrews 7 Wend. 152 - - - - - - 332
—— v. Davis 5 Cow. 123 301, 306
—— v. Harsen 7 Cow. 323 301, 306
—— v. Scissam 3 Johns. 499 - 294, 306
Johanson v. Webster Mfg. Co. 139 W. 181 - - - - - 366
Johnson v. Bauer 82 Fed. 662 268
—— v. Chely 43 Cal. 299 - 310
—— v. Goult 106 W. 247 - 405
—— v. G. N. R. Co. (Minn.) 119 N. W. 1061 - - - 606
—— v. Gurley 52 Tex. 222 - 312
—— v. Lonstorf 128 W. 17 - 167
—— v. State 65 Ga. 94 - - 68
Johnston v. Oshkosh 65 W. 473 - - - - - - - 396
Jones v. Billstein 28 W. 221 - 124
—— v. Florence M. Co. 66 W. 268 - - - - - - - 416
—— v. Reilly 174 N. Y. 97 - 310
Jordan v. Katz 89 Va. 628 - 311
Joseph Dessert L. Co. v. Wadleigh 103 W. 318 - - - 155
Joseph Schlitz B. Co. v. Superior 117 W. 297 - - - - 355

Karr v. Milwaukee L., H. & T. Co. 132 W. 662 - - - 112
Kath v. Wis. Cent. R. Co. 121 W. 503 - - - - - - 601
Kavanaugh v. Wausau 120 W. 611 - - - - - - - 206
Keasbey v. Brooklyn C. Works 142 N. Y. 467 - - 265, 267
Kehrer v. Stewart 197 U. S. 60 193
Kelley v. Whitney 45 W. 110 499
Kelley, M. & Co. v. La Crosse C. Co. 120 W. 84 - - - 676
Kelly v. Bliss 54 W. 187 - - 117
—— v. Fond du Lac 29 W. 439 6
—— v. Houghton 59 W. 400 - 663
Kendrick v. Towle 60 Mich. 363 - - - - - - 366
Kenney Co. v. Anderson (Ky.) 81 S. W. 663 - - - 428
Keystone L. Co. v. Pederson 93 W. 466 - - - - - 173, 176
Killoren v. Murtaugh 64 N. H. 51 - - - - - - - 310
Kimball Co. v. Mellon 80 W. 133 - - - - - - 128
Kingsley v. Merrill 122 W. 185 43
Kleimenhagen v. Dixon 122 W. 526 - - - - - - 154
Klein, *In re*, 95 W. 246 - - 222
Knowlton v. Moore 178 U. S. 41 - - - - - - - 561
Knox v. Clifford 38 W. 651 - 99
Koch v. State 126 W. 470 - 348
Kochersperger v. Drake 167 Ill. 122 - - - - - - 561
Kowalke v. Milwaukee E. R. & L. Co. 103 W. 472 - - 615

La Marchant v. Moore 150 N. Y. 209 - - - - - - 672
Lamoreux v. Bayfield Co. 139 W. 394 - - - - - - 398
Lampman v. Van Alstyne 94 W. 417 - - - 123, 295, 297
Lam Yee v. State 132 W. 527 115
Land, L. & L. Co. v. McIntyre 100 W. 245 - - - - 383
Langton v. Hagerty 35 W. 151 640
—— v. Waite L. R. 6 Eq. 165 674
Larimer Co. v. Lee 3 Colo. App. 177 - - - - - - 216
Larrabee v. Badger 45 Ill. 440 671
Larzelere v. Wood 136 W. 541 29
Lascelles v. State 90 Ga. 347 - 65
Lathrop v. Humble 120 W. 331 - - - - - - - 31
Latta v. Clifford 47 Fed. 614 - 298
Laude v. C. & N. W. R. Co. 33 W. 640 - - - - - - 40
Lawrence Mfg. Co. v. Tenn. Mfg. Co. 138 U. S. 537 - 260
Leasia v. Penokee L. Co. 103 W. 304 - - - - - - 406
Leclanche B. Co. v. Western E. Co. 23 Fed. 276 - - 272
Lee v. C., St. P., M. & O. R. Co. 101 W. 352 - - - 516
LeFeber v. West Allis 119 W. 608 - - - - - 349
Lela v. Domaske 48 W. 623 - 663
Leonard v. White's G. L. Co. 38 Fed. 922 - - - 265, 267
Leonard & Ellis v. Wells & Co. 53 L. J. Ch. 233 - - - 272

Le Page Co. v. Russia C. Co. 51 Fed. 941 - - - 266
Leschen & Sons R. Co. v. Broderick & B. R. Co. 123 Fed. 149 - - - - - - 269
Linde v. Gudden 109 W. 326 - 505
Lindner v. St. Paul F. & M. Ins. Co. 93 W. 526 - - 22
Linoleum Mfg. Co. v. Nairn 38 L. T. Rep. N. S. 448 - 273
—— v. —— L. R. 7 Ch. D. 834 274
Listman M. Co. v. Wm. Listman M. Co. 88 W. 334 265, 267, 279
Little v. Superior R. T. R. Co. 88 W. 402 - - - 83
Littlefield v. Littlefield 28 Me. 180 - - - - - - 351
Livingston v. Peru Iron Co. 9 Wend. 511 - - - - 332
Lonergan v. Royal Exch. Assur. 7 Bing. 725 - - - 216
Loop v. Litchfield 42 N. Y. 351 364
Loree v. Webster Mfg. Co. 134 W. 173 - - - - - - 99
Loucheine v. Strouse 49 W. 623 454
Love's Lessee v. Shields 3 Yerg. 405 - - - - - - 298
Loverin & B. Co. v. Travis 135 W. 322 - - - - - - 193
Lucas v. Brooks 18 Wall. 436 - 311
Lynch v. Troxell 207 Pa. St. 162 - - - - - - 606
Lynn S. Co. v. Auburn-Lynn S. Co. 100 Me. 461 - 260, 265
Lyon v. Grand Rapids 121 W. 609 - - - - - - 611
—— v. Lyon 88 Me. 395 - - 488

Mace v. Reed 89 W. 440 - - 655
Madden v. Kinney 116 W. 561 169
Magnolia M. Co. Trade-marks, *In re*, 14 Rep. Pat. Cas. 621 274
Magoun v. Ill. T. & S. Bank 170 U. S. 283 - - - 561
Maguire v. Smock 42 Ind. 1 - 379
Main v. Sherman Co. 74 Neb. 155 - - - - - - 216
Manitowoc S. B. Works v. Manitowoc G. Co. 120 W. 1 387
Manning v. School Dist. 124 W. 84 - - - - 153, 387-389
Manufacturing Co. v. Trainer 101 U. S. 51 - - - - 261
Markey v. Griffin 109 Ill. App. 212 - - - - - - 21
Markham v. Jaudon 41 N. Y. 235 - - - - - - 672
Marshall v. Pinkham 52 W. 572 - - 260, 264, 265, 268
Marx v. Press P. Co. 134 N. Y. 561 - - - - - 659, 660
Mash v. Bloom 133 W. 646 - 311
Matthews v. Bates, K. & Co. 93 Ga. 317 - - - - - - 68
McAllister v. State 112 W. 496 85, 86
McCaffrey v. Mossberg & G. Mfg. Co. 23 R. I. 381 - - 364
McCann v. Welch 106 W. 142 123, 124, 297, 298, 300, 313, 338
McCartney v. Bostwick 32 N. Y. 53 - - - - - - 499
McComb v. Barcelona A. Asso. 134 N. Y. 598 - - - 241
McCord v. Eastern R. Co. 136 W. 254 - - - - 161, 162
McDermott v. Jackson 97 W. 64 - - - - - - - 678
McDougald v. Reedy 71 Ga. 750 - - - - - - 327
McHenry v. Alford 168 U. S. 651 - - - - 523, 528
McKinney v. Jones 55 W. 39 - 154
McMahon v. McGraw 26 W. 614 - - - - - - 125
—— v. Snyder 117 W. 463 - 66
McMillan v. Wehle 55 W. 685 298
McNeally v. State 5 Wyo. 59 - 69
McWilliams v. Brookens 39 W. 334 - - - - - - 428
Mears v. Dole 135 Mass. 508 - 349, 355
Meier v. Bell 119 W. 482 494, 500
Menasha W. W. Co. v. Michelstetter 126 W. 427 - - 407
Mercer v. Wright 3 W. 645 - 83
Merrifield's Estate v. People 212 Ill. 400 - - - - - 590
Messer v. Oestreich 52 W. 684 314
M. E. Church v. N. P. R. Co. 78 W. 131 - - - - 312
Meyer v. Garthwaite 92 W. 571 - - - - - - 222
—— v. Hope 101 W. 123 - 36
—— v. Milwaukee E. R. & L. Co. 116 W. 336 - - - 111
Midlothian I. M. Co. v. Belknap 108 W. 198 - - - - 393
Mielke v. Dodge 135 W. 388 - 29
Miles v. Mut. R. F. L. Asso. 108 W. 421 - - - - 174
Millen v. Stines 81 Ga. 655 298, 313
Miller v. Bonsadon 9 Ala. 317 311
—— v. County of Kern 137 Cal. 516 - - - - - - 134
—— v. State 77 W. 271 - - 7
Mills v. C. & N. W. R. Co. 103 W. 192 - - - - - 314
Milwaukee v. Gross 21 W. 241 541

Milwaukee Co. v. Pabst 64 W. 244 - - - - - - 6
Milwaukee E. R. & L. Co. v. Bradley 108 W. 467 - - 355
Milwaukee & M. R. Co. v. Finney 10 W. 388 - - - 655
Montgomery v. Am. Cent. Ins. Co. 108 W. 146 - - - 117
—— v. Deeley 3 W. 709 - - 651
—— v. State 128 W. 183 - - 89
Moran's Will, *In re*, 118 W. 177 - - - - - - 486
Morey v. Lake Superior T. & T. Co. 125 W. 148 - - 111
Morgan v. Edwards 53 W. 599 128
Morrison v. Case 9 Blatchf. 548 268
Morse v. Gilman 16 W. 504 153, 174
Mueller v. Cook 126 W. 504 - 31
Murphy v. State 124 W. 635 - 73
Musbach v. Wis. C. Co. 108 W. 57 - - - - - - - 184

Nass v. Schulz 105 W. 146 - 444
Nat. Bank v. Ill. & Wis. L. Co. 101 W. 247 - - - - - 663
Nat. B. Co. v. Baker 95 Fed. 135 - - - - - 265, 267
Nat. State Bank v. Sanford T. & T. Co. 157 Ind. 10 - - 241
Nelson v. Jacobs 99 W. 547 123, 124
Nesbit v. Riverside I. Dist. 144 U. S. 610 - - - - - 465
Newark v. Merchants' Ins. Co. 55 N. J. Law 145 - - - 48
New Haven v. N. H. & D. R. Co. 62 Conn. 252 - - - 379
New Home S. M. Co. v. Simon 107 W. 368 - - - - - 78
Newland v. Morris 113 W. 394 1, 5
Newton v. State 21 Fla. 53 - 69
—— v. Whitney 77 W. 515 - 663
New Zealand B. Corp., *In re*, L. R. 3 Ch. App. 131 - - 243
Nicoulin v. Lowery 49 N. J. Law 391 - - - - - 349
N. K. Fairbank Co. v. Central L. Co. 64 Fed. 133 265, 267, 280
Norden v. Jones 33 W. 600 - 475
North v. Henneberry 44 W. 306 - - - - - - 505
North Milwaukee, *In re*, 93 W. 616 - - - - - - 167
Northern S. Co. v. Wangard 123 W. 1 - - - - - 675
Northwestern C. M. Co. v. Mauser & C. 162 Fed. 1004 265
Northwestern F. Co. v. Lee 102 W. 426 - - - - - - 241
Norton v. Rock Co. 13 W. 611 397
Nunnemacher v. State 129 W. 190 552–3, 555–6, 560–1, 583–4

Oates v. Metropolitan St. R. Co. 168 Mo. 535 - - - - 443
O'Brien v. Wetherell 14 Kan. 616 - - - - - - 326
Ocean S. Co. v. Williams 69 Ga. 251 - - - - - - 21
O'Dell v. Burnham 61 W. 562 125
Off v. Heinrichs 124 W. 440 - 314
Oglivie v. G. & C. Merriam Co. 149 Fed. 858 - - - 273
Ohio L. I. & T. Co. v. Merchants' I. & T. Co. 11 Humph. 1 - 379
Oleson v. Brown 41 W. 413 - 448
Oliver v. Pullman 24 Fed. 127 298, 313
Olney, for an opinion, 27 R. I. 495 - - - - - - 488
Olson v. Hawkins 135 W. 394 348
Olwell v. Skobis 126 W. 308 - 516
Oneida Co. v. Tibbits 125 W. 9 219
Osborn v. Rawson 47 Mich. 206 428
Oscanyan v. Arms Co. 103 U. S. 261 - - - - - - 381
Ottillie v. Wæchter 33 W. 252 6
Owen v. Long 97 W. 78 - - 118
—— v. Portage T. Co. 126 W. 412 - - - - - - 111

Page v. Danaher 43 W. 221 - 505
—— v. Sumpter 53 W. 652 - 448
Palairet's Appeal 67 Pa. St. 479 488
Palmer, Matter of, 117 App. Div. 360 - - - - - 591
Palmer v. Matthews 162 N. Y. 100 - - - - - - 641
—— v. Schultz 138 W. 455 - 517
Pandow v. Eichsted 90 W. 298 651
Parcher v. Marathon Co. 52 W. 388 - - - - - - 397
Park v. Detroit F. P. Co. 72 Mich. 560 - - - - - 640
—— v. Richardson & B. Co. 81 W. 399 - - - 427, 429, 431
Parkinson v. Atkinson 31 L. J. N. S. C. P. 199 - - - 216
Parrott v. Hungelburger 9 Mont. 526 - - - - - 311
Parry Mfg. Co. v. Tobin 106 W. 286 - - - - 428, 429
Parsons v. Harper 16 Grat. 64 22
—— v. Parsons 101 W. 76 - 487
Patnode v. Westenhaver 114 W. 460 - - - - - - 83
Patry v. C., St. P., M. & O. R. Co. 77 W. 218 - - 655, 656
Patterson v. Hansel 4 Bush 654 311

Pelitier v. C., St. P., M. & O. R. Co. 88 W. 521 - - - 518
Pellage v. Pellage 32 W. 136 - 6
Pennsylvania S. Mfg. Co. v. Meyers 79 Fed. 87 - 265, 267
People v. DeLacey 28 Cal. 589 68
—— v. Diaz 6 Cal. 248 - - 69
—— v. Fong Chung 5 Cal. App. 587 - - - - - - 69
—— v. Hanrahan 75 Mich. 611 544
—— v. Montgomery 13 Abb. Pr. N. S. 207 - - - - 216
—— v. Sickles 156 N. Y. 541 - 533
—— v. Stephens 71 N. Y. 527 383
People's L. & B. Asso. v. Whitmore 75 Me. 117 - - - 310
Pepper v. O'Dowd 39 W. 538 - 313
Peralta v. Ginochio 47 Cal. 459 310
Pereles v. Leiser 123 W. 233 - 666
Perin v. C., N. O. & T. P. R. Co. 18 Weekly Law Bul. 382 243
Perkins v. State 78 W. 551 - 76
Perry v. Perry 99 N. C. 270 - 298
Peterson v. Stoughton State Bank 78 W. 113 - - - 128
Phelps v. Abbott 114 Mich. 88 100
Phillips v. Rothwell 4 Bibb 33 307
Pier v. Oneida Co. 93 W. 463 - 397
Pingry v. Washburn 1 Aik. (Vt.) 264 - - - - - 382
Pitman v. Hill 117 W. 318 297, 300
Plank v. Grimm 62 W. 251 - 657
Plunkett v. M., S. S. M. & A. R. Co. 79 W. 222 - - - 448
Polaski v. Pittsburgh C. D. Co. 134 W. 259 - - 13, 111, 112
Pope v. Burlington Sav. Bank 56 Vt. 284 - - - - - 498
Portance v. Lehigh Valley C. Co. 101 W. 574 - - - 111
Porter v. Pittsburg B. S. Co. 122 U. S. 267 - - - 239
Potter D. & C. Corp. v. Miller 75 Fed. 656 - - - 265, 267
Powell v. Ashland L. & S. Co. 98 W. 35 - - - - - 115
Pratt v. S. Freeman & Sons Mfg. Co. 115 W. 648 - - 432
Preston N. Bank v. G. T. Smith M. P. Co. 84 Mich. 364 - 241
Promer v. M., L. S. & W. R. Co. 90 W. 215 - - - 110
Pulford v. Whicher 76 W. 555 293, 294, 303-305, 333, 334
Pullen v. Comm'rs 66 N. C. 361 559
Pumorlo v. Merrill 125 W. 102 77, 444
Quee D. Co. v. Plaut 55 App. Div. 87 - - - - - - 241
Racine Co. Bank v. Keep 13 W. 209 - - - - - - 99
Raley v. Ross 59 Ga. 862 - 326
Rankl v. Schmidt 133 W. 103 407
Ray v. Hixon 90 W. 39 - - 7
Raynor v. State 62 W. 289 - 541
Reed v. McConnell 101 N. Y. 270 - - - - - - 606
—— v. Shepley 6 Vt. 602 - 328
Rees v. Pellow 97 Fed. 167 - 671
Reffke v. Patten P. Co. 136 W. 535 - - - - - - 444
Regan v. Jessup 34 Tex. Civ. App. 74 - - - - - 22
Rehbein v. Rahr 109 W. 136 - 625
Reiley v. Timme 53 W. 63 - 639
Reitler v. Lindstrom 126 W. 562 - - - - - - 297
Richards v. Land & R. Imp. Co. 99 W. 625 - - - 666
—— v. State 82 W. 172 - - 77
Richardson v. Shaw 209 U. S. 365 - - - - - - 672
Ricketson v. Galligan 89 W. 394 - - - - - - 311
Riggs v. Fenton 3 Mo. 28 - 68
Robinson v. Superior R. T. R. Co. 94 W. 345 - - 655, 656
Roedler v. C., M. & St. P. R. Co. 129 W. 270 - - - 456
Roelker, *In re*, 1 Spr. Dec. 276 216
Rogers-Ruger Co. v. School Directors 139 W. 135 - 143, 144
Rohloff v. Aid Asso. 130 W. 61 563, 592
Rosenthal v. People 211 Ill. 306 - - - - - - 590
Rowell v. Smith 123 W. 510 - 465
Rowley v. C., M. & St. P. R. Co. 135 W. 208 - - - 516
Royal B. P. Co. v. Sherrell 93 N. Y. 331 - - - - - 262
Rueping v. C. & N. W. R. Co. 116 W. 625 - - - - 655
Russell v. Irwin's Adm'r 38 Ala. 44 - - - - - - 309
—— v. Russell 84 Ala. 48 - 488
Ruege v. Gates 71 W. 634 - 117
Ryan v. State 115 W. 488 77, 81

Sage v. Halverson 72 Minn. 294 311
St. Clair v. Rutledge 115 W. 583 - - - - - - 241
St. Louis & S. F. R. Co. v. Woolum 84 Tex. 570 - - 68
Salisbury v. Comm. 79 Ky. 425 - - - - - - 68
Salmon v. Libby 114 Ill. App. 258 - - - - - - 364

Sanborn v. French 22 N. H. 246 - - - - - 298, 313
Sands v. Hughes 53 N. Y. 287 306, 328
Saunders v. Annesly 2 Sch. & Lef. 73 - - - - - - 309
Saxlehner v. Eisner & M. Co. 179 U. S. 19 - - - - 269
Schafer v. Eneu 54 Pa. St. 304 487, 489
Schamper v. Ullrich 131 W. 524 - - - - - - 68
Schlitz B. Co. v. Superior 117 W. 297 - - - - - - 355
Schmeckpepper v. C. & N. W. R. Co. 116 W. 592 - - 111
Schmidt v. State 124 W. 516 77, 78
Schofield v. Little 2 Ga. App. 286 - - - - - - 217
School Dist. v. Long (Pa.) 10 Atl. 769 - - - - - 310
Schroeder v. Wis. Cent. R. Co. 117 W. 33 - - - - - 73
Schrunk v. St. Joseph 120 W. 223 - - - - - - 516
Schultz v. Culbertson 125 W. 169 - - - - - - 22
—— v. State 133 W. 215 - - 89
Schutz v. State 125 W. 452 - 89
Schwantes v. State 127 W. 160 206
Schwartz v. Oshkosh 55 W. 490 543
Scott v. Berkshire Co. Sav. Bank 140 Mass. 157 - - 498
Scott L. Co. v. Oneida Co. 72 W. 158 - - - - - - 396
Secor v. State 118 W. 621 - 86
Seeger v. Manitowoc S. B. Works 120 W. 11 - - - 31
Selchow v. Baker 93 N. Y. 60 280
—— v. Chaffee & S. Mfg. Co. 132 Fed. 996 - - - 279
Serfling v. Andrews 106 W. 78 675
Sewall v. Roberts 115 Mass. 262 487, 490
Shackleford v. Bailey 35 Ill. 387 - - - - - - 313
Shafer v. Eau Claire 105 W. 239 7
Sheahan v. Collins 20 Ill. 325 641
Shelby v. Miller 114 W. 660 - 380
Shenandoah Nat. Bank v. Marsh 89 Iowa 273 - - 128
Sherburne v. Rodman 51 W. 474 - - - - - - 657
Sherman v. Champlain T. Co. 31 Vt. 162 - - 327, 328, 337
—— v. Menominee River L. Co. 72 W. 122 - - - 416
—— v. New Bedford F. C. Sav. Bank 138 Mass. 581 - - 498
Sherman Center T. Co. v. Morris 43 Kan. 282 - - - 241
Sibbald v. Bethlehem I. Co. 83 N. Y. 378 - - - 671
Sigafus v. Porter 85 Fed. 689 - 523
Simanek v. Nemetz 120 W. 42 133
Simmons v. Johnson 14 W. 523 314
Singer v. Bender 64 W. 169 - 651
Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 169 - 263, 264, 273
Skiff v. Stoddard 63 Conn. 198 672
Skinker v. Heman 64 Mo. App. 441 - - - - - - 349
Sladky v. Marinette L. Co. 107 W. 250 - - - - - - 185
Sletten v. Madison 122 W. 251 661, 662
Smeesters v. Schroeder 123 W. 116 - - - - - 428, 429
Smith v. Applegate 23 N. J. Law 352 - - - - - 382
—— v. Burns B. & Mfg. Co. 132 W. 177 - - - - - 625
—— v. C., M. & St. P. R. Co. 91 W. 503 - - - - - 111
—— v. Lewis 20 W. 350 - - 397
—— v. New York S. & P. C. H. Co. 70 Hun 597 - - 671
—— v. Smith 19 W. 522 - - 6
Society, etc. v. Pawlet 4 Pet. 480 - - - - - - 329
—— v. Sharon 28 Vt. 603 - 308
Solverson v. Peterson 64 W. 198 - - - - - - 651
Spear v. Hiles 67 W. 361 - 607
Spence v. Ham 163 N. Y. 220 387
Spencer v. C., M. & St. P. R. Co. 105 W. 311 - - - - - 184
Sperry v. Horr 32 Iowa 184 - 128
Stafford v. Chippewa Valley E. R. Co. 110 W. 331 - - 348
Standard Oil Co. v. Murray 119 Fed. 572 - - - 364
Stange Co. v. Merrill 134 W. 514 - - - 173, 176, 355
State v. Anson 20 W. 651 523, 525-8
—— v. Bailey 94 Mo. 311 - 65
—— v. Bartley 48 Kan. 421 - 69
—— v. Bell 212 Mo. 111 - - 216
—— v. Clarke 25 N. J. Law 54 169
—— v. Cornhauser 74 W. 42 - 528
—— v. Dettmer 124 Mo. 426 - 65
—— v. Dyke 96 Mo. 298 - - 69
—— v. Felter 25 Iowa 67 - 69
—— v. Gross 62 W. 41 - 525, 528
—— v. Hornsby 8 Rob. (La.) 554 - - - - - - 218
—— v. Jenkins 60 W. 599 - 525
—— v. Juneau 88 W. 180 525, 528

State v. Knight 118 W. 473 - 528
—— v. Lloyd 133 W. 468 36, 297
—— v. Loe 98 Mo. 609 - - 69
—— v. Lund 49 Kan. 580 - 69
—— v. McCoy 111 Mo. 517 - 65
—— v. Morristown 33 N. J. Law 57 - - - - - - 169
—— v. Murdy 81 Iowa 603 65, 68
—— v. Railway Cos. 128 W. 449 - - - - - - 584
—— v. Shannehan 22 Iowa 435 69
—— v. Sheppard 64 Minn. 287 349
—— v. Stoll 17 Wall. 425 - 169
—— v. Teipner 36 Minn. 535 - 216
—— v. Whitcom 122 W. 110 - 348
State *ex rel.* Cook v. Houser 122 W. 534 - - - - - - 43
—— Curtis v. Geneva 107 W. 1 381
—— Dosch v. Ryan 127 W. 599 380, 383
—— Fourth Nat. Bank v. Johnson 103 W. 591 - - - 540
—— Hamilton v. Municipal Court 89 W. 358 - - - 543
—— Jameson v. Denny 118 Ind. 382 - - - - - - 169
—— Newell v. Purdy 36 W. 213 381
—— Umbreit v. Helms 136 W. 432 - - - - - - 541
—— Wildman v. Kidd 63 W. 337 - - - - - - 378
Steele v. Schricker 55 W. 134 99
Steffen v. Supreme Assembly 130 W. 485 - - - - - 614
Stevens v. Brooks 24 W. 326 - 330, 335, 336
Stoltman v. Lake 124 W. 462 - 348
Stolze v. Manitowoc T. Co. 100 W. 208 - - - - - - 206
Storer v. Freeman 6 Mass. 435 350
Storey v. Early 86 Ill. 461 - 654
Stratton Claimants v. Morris Claimants 89 Tenn. 497 - 559
Strong v. Stevens Point 62 W. 255 - - - - - - 612
Suckow v. State 122 W. 156 73, 83
Summers v. State 5 Tex. App. 365 - - - - - - 216
Sun P. & P. Asso. v. Schenck 98 Fed. 925 - - - - - 641
Swann v. Thayer 36 W. Va. 46 308
—— v. Young 36 W. Va. 57 - 308
Swarts v. Narragansett E. L. Co. 26 R. I. 388 - - - 148
Swift v. James 50 W. 540 153, 155
Sydnor v. Palmer 29 W. 226 - 314

Taussig v. Hart 58 N. Y. 425 671, 674
Taylor v. Matteson 86 W. 113 402
—— v. Seil 120 W. 32 - - 469
—— v. Thieman 132 W. 38 - 480
T. B. Scott L. Co. v. Oneida Co. 72 W. 158 - - - 396
Territory v. Guthrie 2 Idaho 432 - - - - - - 69
—— v. Harding 6 Mont. 323 - 69
Tewksbury v. Magraff 33 Cal. 237 - - - - - - 310
Texas & P. R. Co. v. Bigham 90 Tex. 223 - - - - - 366
Thomas v. Thomas 107 Mo. 459 498
—— v. Winchester 6 N. Y. 397 365
Thompson v. Meade 7 T. L. Rep. 698 - - - - - 671
—— v. W. W. V. R. Co. 132 U. S. 68 - - - - - - 239
Tiffany v. Kellogg Iron Works 59 Misc. 113 - - - 217
Tilly v. Mitchell & L. Co. 121 W. 1 - - - - - - 167
Tompkins v. Snow 63 Barb. 525 - - - - - - 306
Townsend v. Boyd 217 Pa. St. 386 - - - 302, 309, 327
Trade-mark Cases 100 U. S. 82 269
Trustees of East Hampton v. Kirk 68 N. Y. 459 - - 350
Tucker v. Lawson 2 T. L. Rep. 593 - - - - - - 641
Turley v. Rodgers 1 A. K. Marsh. 245 - - - - - 309
Twohy v. Estate of McDonald 108 W. 21 - - - - - 31
Tyler v. Davis 61 Tex. 674 - 311

Ullman v. State 124 W. 602 - 95
Union P. R. Co. v. Cappier 66 Kan. 649 - - - - - 443
U. S. v. U. P. R. Co. 168 U. S. 505 - - - - - - 523
Upton v. Hume 24 Oreg. 420 659–60

Vacuum O. Co. v. Eagle O. Co. 122 Fed. 105 - - - - 270
Van Rensselaer v. Jewett 2 N. Y. 141 - - - - - - 312
Vassau v. Madison E. R. Co. 106 W. 301 - - - - - 655
Virgin v. Marwick 97 Me. 578 488
Vogel v. State 138 W. 315 522, 662
Von Trott v. Von Trott 118 W. 29 - - - - - - - 406

Walker v. Duncan 68 W. 624 - 475
Wallace v. Ocean Grove C. M. Asso. 148 Fed. 672 - - 310
Walt v. Walsh 10 Heisk. 314 - 68

Ward v. C., M. & St. P. R. Co. 102 W. 215 - - - - 518
Warren v. Prescott 84 Me. 483 488
Warren F. Co. v. Am. F. Co. 141 Fed. 513 - - - - 273
Washburn v. M. & L. W. R. Co. 59 W. 364 - - 203, 205
Washington Irr. Co. v. Krutz 119 Fed. 279 - - - . 382
Waterloo O. Co., *In re*, 134 Fed. 345 - - - - - - 244
Watson v. M. & M. R. Co. 57 W. 332 - - - 203, 204, 206
Watts v. Owens 62 W. 512 299, 334
Webb v. Page 1 Carr. & K. 23 216
Webber v. Clarke 74 Cal. 11 298, 313
Webster v. Zielly 52 Barb. 482 133
Weil v. Schmidt 28 W. 137 - 651
Weisenberg v. Appleton 26 W. 56 - - - - - - - 663
Wendel v. State 62 W. 300 - 541
Wentworth v. Racine Co. 99 W. 26 - - - - - - 465
Werner v. Ascher 86 W. 349 - 640
—— v. C. & N. W. R. Co. 105 W. 300 - - - - - - 610
West v. State 1 W. 209 - - 213
West Jersey R. Co. v. Trenton C. W. Co. 32 N. J. Law 517 237
Western Assur. Co. v. Towle 65 W. 247 - - - - - 475
Westurn, Matter of, 152 N. Y. 93 - - - - - - - 584
Weyer v. C., W. & N. R. Co. 68 W. 180 - - - - - 203
White v. McLean 47 How. Pr. 193 - - - - - - 83
—— v. Miller (Iowa) 105 N. W. 993 - - - - - - 428
Whiting v. Edmunds 94 N. Y. 309 - - - 294, 306, 328
Whitney v. Karner 44 W. 563 667
—— v. Robinson 53 W. 309 - 314
Whitney & S. Co. v. O'Rourke 172 Ill. 177 - - - - - 515
Whittlesey v. Hoppenyan 72 W. 140 - - - 124, 298, 313
Wilkins v. Nicolai 99 W. 178 - 300
Willard v. Press P. Co. 52 App. Div. 448 - - - - 659, 660
Williams v. Wait 2 S. Dak. 210 311
Willis v. Harrell 118 Ga. 906 - 310
Willison v. Watkins 3 Pet. 43 328–331, 336, 337
Wilson v. Carpenter 17 W. 512 499
—— v. Chippewa Valley E. R. Co. 135 W. 18 - - - 438
—— v. Fitch 41 Cal. 363 - - 641
—— v. Noonan 23 W. 105 - 651
—— v. —— 35 W. 321 640, 657, 658
—— ads. Weatherby 1 Nott & McC. 374 - - - - - 330
Winchel v. Goodyear 126 W. 271 - - - - - - 73
Winchester v. Davis P. Co. 67 Fed. 45 - - - - - - 149
Winter v. Montgomery 79 Ala. 481 - - - - - - 606
Wis. River Imp. Co. v. Lyons 30 W. 61 - - - - - 6
Wis. S. F. Co. v. D. K. Jeffris L. Co. 132 W. 1 - - - 117
Wistar v. Philadelphia 80 Pa. St. 505 - - - - - - 53
Wittmann v. Berger 125 W. 626 - - - - - - 406
Wolf v. Theresa V. Mut. F. Ins. Co. 115 W. 402 - - 458
Wollman v. Ruehle 100 W. 31 300
—— v. —— 104 W. 603 - - 36
Wood v. Blythe 42 W. 300 - 6
Woodcock's Appeal 103 Me. 214 - - - - 488–490
Woodward v. Miller 119 Ga. 618 - - - - - - 363
Worden v. C. & N. W. R. Co. 82 Iowa 735 - - - - 149
W. R. Lynn S. Co. v. Auburn-Lynn S. Co. 100 Me. 461 260, 265
W. W. Kimball Co. v. Mellon 80 W. 133 - - - - - 128
Wyeth v. Stone 144 Mass. 441 488–9
Wynehamer v. People 13 N. Y. 378 - - - - - - 559

Zieman v. Kieckhefer E. Mfg. Co. 90 W. 497 - - - 364

STATUTES CITED.

CONSTITUTION OF WISCONSIN.

Art. I, sec. 1 - - - 560
" I, " 7 - - - 218
" I, " 13 - - - 560
" VII, " 3 - - - 540
" VIII, " 1 - 545, 556, 558, 561, 583

SESSION LAWS.

1874. Ch. 184 - - - - 168
1882. " 221, subch. III - 197
1891. " 124, sec. 35, subd. 30 168
1891. " 419 - - - - 169
1893. " 310 - - - 49, 51, 54
1893. " 310, sec. 6 - 49, 51
1895. " 7 - - - - 541
1899. " 218 - - - - 543
1899. " 351, sec. 27 - - 193
1899. " 356 - - - 126, 128
1901. " 124, sec. 35, subd. 30 168
1901. " 160 - - - 141, 142
1901. " 399, sec. 1 - - 193
1901. " 416 - - - - 140
1901. " 434 - - - - 193
1903. " 44 - - 545, 552, 557 561–563, 583, 584
1903. " 44, sec. 1 - 554, 584
1903. " 44, " 1, subd. 3 - 589
1903. " 44, " 1, " 4, 6 585
1903. " 44, " 2, 545, 553, 554
1903. " 44, " 2, subd. 1 - 589
1903. " 44, " 3 545, 553, 554
1903. " 44, " 4 - - 554
1903. " 44, " 5 - - 585
1903. " 44, " 6 563, 595, 596
1903. " 44, " 8 - - 587
1903. " 44, " 13, subd. 3 - 562, 587
1903. " 44, " 13, " 5 - 563, 589
1903. " 44, " 24 - - 586
1903. " 159 - - - 1, 3, 4
1903. " 230 - - - 38–40
1903. " 230, secs. 1, 2 - - 39
1903. " 230, sec. 3 - 37, 39
1903. " 230, secs. 6, 7 - - 39
1903. " 249 - - 552, 557, 583
1903. " 249, sec. 2 - - 589
1903. " 378 - - - 44–46
1903. " 378, sec. 2 - 41, 42
1903. " 378, " 3 - - 46
1903. " 378, " 6 - - 47
1903. " 378, " 9 - 41, 48
1905. " 6 - - - - 202
1905. " 295 - - - - 436
1905. " 303 - - - 459, 461
1905. " 506 - 616, 617, 622, 626

SESSION LAWS — con.

1905. Ch. 506, sec. 1 - - 193
1905. " 506, " 1, subd. 2, 10 616, 623
1907. " 61 - - 195, 197, 199
1907. " 72 - - - - 543
1907. " 272 - - - - 436
1907. " 346 - - - - 508
1907. " 486 - - - 37, 39
1907. " 581 - - - 449, 454

MILWAUKEE CITY CHARTER.

Ch. 7, sec. 2 - - 49, 50, 52, 54
" 7, " 6 - - - 49, 52–54
" 9, " 1 - - - - 347

REVISED STATUTES OF 1849.

Ch. 134, sec. 11 - - - 530

REVISED STATUTES OF 1878.

Section 1189 - - - - 333
Sections 1210*d*, 1210*e* - - 333
Section 2831 - - - - 7
" 3156 - - - - 666

STATUTES (1898 and since).

Sec. *Page.*
518 - - - - - - 140
518–530 - - - - - 135
520–522 - - - - - 140
523, 524 - - - - - 141
525 - - - - - - 142
526–528, 530 - - - - 141
600 - - - - - 219, 222
604*q* - - - - - 222
904 - - - - 168, 169
925—56 - - - - - 543
925—67 - - - - - 543
925—259 - - - - 198
927 - - - - - 168, 169
959—35 - - - - - 49, 51
959—40 - - - - - 195
959—40 *et seq.* (L. 1907, ch. 61) 195, 198
959—41 (L. 1907, ch. 61) 195, 197–9
1024, 1024*a* - - - 563, 592
1038, subd. 11 - - - 132–134
1056, clause 2 - - - - 47
1184 - - - - - 394, 397
1187 - - - - 390, 392, 393
1189, 1190 - - - 390, 393
1210*b* - - - - - 396
1210*d* - - - - - 56
1210*h* - - - - - 394
1636*j* - - 101, 107, 459, 461
1636*jj* (L. 1905, ch. 303) - 459, 461

STATUTES (1898 and since) — con.

Sec.	Page.
1636—63	37
1675—2	128
1678—34	126, 429
1751	243
1753	228, 235, 243–245
1754, 1756	243
1770*b*	190, 191, 193, 616, 617, 622
1816	108, 111
1816*b*	434, 445
1862	235
2077	494, 498–500
2265, 2266	163, 166–169
2443	221
2499	541
2514	543
2610	401
2654	149
2656	475
2656*a*	399, 401, 402
2660	475
2668	173
2704	1, 3, 4
2705, 2706	1, 4, 5
2829	66, 94, 155, 173, 472, 479, 516
2831	2, 6
2832	667
2858	516
2858*m* (L. 1907, ch. 346)	508
2865	406
2869	202
2921	435, 448
3087	393, 394
3092	1–7
3200	551
3294–3313 (ch. 142)	543
3918	124
3962–3995*b* (ch. 170)	221
3976	221
3995*b*	221

STATUTES (1898 and since) — con.

Sec.	Page.
4021	629
4024	481, 486
4057	213
4058	213, 218
4060	219
4062	218, 219
4063, 4064	213
4067	213
4096	505, 508
4160	563, 592
4192	24, 25, 33
4201	656
4207	23, 24, 28, 36
4209	34
4210	24, 36, 281, 282, 299, 331, 333, 338, 339
4211	123, 281, 282, 295, 298, 303, 306, 333, 337–339
4212	123, 305, 306, 337
4213	282, 338
4215	23, 24, 28, 36, 123, 282, 299, 337
4216	281, 282, 293, 295, 305, 331, 337–339
4218	123
4222, subd. 5	434, 445
4222, " 7	124, 125
4256	454
4407, 4408	530
4409	529–532
4410, 4411	530
4412	531
4475	367, 368, 378
4641	218
4721	519, 523, 528
4736	532
4736–4738	529, 534
4986, 4987	169

TEXT-BOOKS CITED.

1 Am. & Eng. Ency. of Law (2d ed.) 811 - - - 303
8 Am. & Eng. Ency. of Law (2d ed.) 302 *et seq.* - - 134
18 Am. & Eng. Ency. of Law (2d ed.) 415 - - - - 310
28 Am. & Eng. Ency. of Law (2d ed.) 734 - - - - 674
30 Am. & Eng. Ency. of Law (2d ed.) 1217 - - - 237

Beach, Contrib. Neg. § 304 - 416
1 Blackstone, Comm. 138 - 558
1 Bouvier, Law Dict. 947 - 351
2 Bouvier, Law Dict. tit. PROPERTY - - - - 559
Browne, Trade-marks, §§ 50, 51 - - - - - - 270
—— §§ 87–91 - - - - 263
—— (2d ed., Supp.) 161–164 - 278
—— (2d ed.) § 219 - - - 279

Clark, Street Railway Acc. Law, § 114 - - - - 443
Coke, Littleton, lib. 1, c. 1, Of Fee Simple (sec. 1, 7. b.) - 559
1 Cook, Corp. § 192 - - 626
—— § 292 - - - - 243
3 Cook, Corp. (5th ed.) sec. 766, p. 2016 *et seq.* - - 244
Cooley, Const. Lim. 223 - - 169
2 Cooley, Taxation (3d ed.) 1094 - - - - - 556
1 Cyc. 1062 - - - - 303
2 Cyc. 251 - - - - 505
4 Cyc. 22, 23 - - - - 149
10 Cyc. 384 - - - - 625
13 Cyc. 119 - - - - 470
19 Cyc. 366 - - - - 22
24 Cyc. 938 - - - - 310

1 Dos Passos, Stock Brokers (2d ed.) 207 - - - - 671
—— 218 *et seq.* - - - - 670
—— 251 - - - - - 672
—— 258, 276 - - - - 674

3 Elliott, Ev. § 2110 - - 21
4 Ency. Pl. & Pr. 886 - - 70

Gould, Waters, § 45 - - 351
Greenhood, Public Policy, 308, 309 - - - - - 383

1 Greenleaf, Ev. § 108 - - 23
—— (13th ed.) § 310 - - 216
—— (15th ed.) §§ 52, 448 - 226

2 Hamilton, Legal Medicine, 504 - - - - - - 609

Jones, Ev. (2d ed.) § 170 - 657
—— § 254 (255) - - - 90
Jones, Landl. & T. § 697 - 310
—— § 699 - - - - 327

2 Kent, Comm. 320 - - - 558
Kerly, Trade-marks, 243 - 274

McQuillan, Mun. Ord. 297 - 349
2 Mechem, Sales, §§ 854, 914 *et seq.* - - - - - 194

Newell, Ejectment, 602 - - 326
Newell, Libel & S. 890 - - 654

Ogston, Medical Jurisprudence, 81, 82 - - - - - - 609
Ordronaux, Med. Jur. (ed. 1869) 138 - - - - 216

Paul, Trade-marks, § 35 - - 263
—— § 49 - - - - - 265
Perry, Trusts, § 86 - - - 499

Roscoe, Crim. Ev. 417, 418 - 90

Sedgwick & Wait, Trial of Title, § 350 - - - - - - 312
3 Starkie, Ev. 235 (vol. 2, 7th Am. ed., 327) - - - 90
1 Sutherland, Damages (3d ed.) § 57 - - - - 448

1 Taylor, Med. Jur. 19 - - 216
2 Thompson, Comm. on Neg. §§ 1419, 1420 - - - 443
Townshend, Slander & L. § 139 651

1 Washburn, Real Prop. (5th ed.) 599 - - - - 311
Webb's Pollock, Torts (Am. ed.) 29, 30 - - - - 366
Wharton, Crim. Ev. (9th ed.) § 698 - - - - - 90
—— § 699 - - - - 89
3 Wigmore, Ev. 2203 - - 216

CASES DETERMINED

AT THE

January Term, 1909.

DICKINSON, Respondent, vs. SMITH and another, Appellants.

March 12—March 30, 1909.

Ejectment: New trial: Undertaking: Justification of sureties: Failure to pay costs not taxed: Extension of time: Amending defective undertaking after the year.

1. Sec. 3092, Stats. (1898), providing that the sureties on the undertaking of a party applying for a new trial in ejectment "shall justify their responsibility in the same manner as bail on arrest," does not refer to sec. 2704 (as amended by ch. 159, Laws of 1903), which prescribes the *qualifications* of bail, but to secs. 2705, 2706, which prescribe the manner of *justification* and the proceedings thereon. *Newland v. Morris*, 113 Wis. 394, overruled.
2. Where the order granting a new trial in ejectment fixed the amount of the undertaking and required the sureties to "justify their responsibility as required by law," this meant that the sureties should satisfy the trial judge in the first instance as to their responsibility, subject to being required to justify on notice as provided in sec. 2705, Stats. (1898).
3. Although the sureties in such case failed to state, in their affidavit appended to the undertaking, that the property possessed by each was "over and above all his debts and liabilities," yet when the undertaking was approved by the trial judge the justification was sufficient under sec. 3092, Stats. (1898), subject only to further justification on notice under sec. 2705.
4. An order vacating the judgment and granting a new trial in ejectment should not be set aside because of failure of the applicant to pay costs awarded on affirmance of the judgment, where it appeared that the other party had neglected to have such costs taxed. The order should be modified in such case

by making the new trial conditional upon payment of such costs within a reasonable time after they should be taxed, treating the time for payment as thus extended under sec. 2831, Stats. (1898).

5. Under sec. 2831, Stats. (1898), the court may, in discretion, permit a defective undertaking given under sec. 3092 to be amended, even after the expiration of the year within which the right to a new trial must be exercised.

APPEAL from orders of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *One order modified; the other reversed.*

In an action in ejectment plaintiff recovered judgment. It was affirmed on appeal to this court. In due course the *remittitur* was filed in the office of the clerk of the circuit court. It contained this language:

"It is now here ordered and adjudged by this court that the judgment of the circuit court of Outagamie county in this cause be and the same is hereby affirmed with costs against the said appellants taxed at the sum of —— dollars."

Thereafter defendants applied for an order vacating the circuit court judgment, and granting a new trial under sec. 3092, Stats. (1898), presenting an affidavit stating the facts, including that they had paid all costs recovered in the judgment against them. An order was entered pursuant to such application, granting the same, upon condition of defendants giving an undertaking pursuant to such section, in the sum of $200. For the purpose of complying with such condition, defendants presented to the trial judge an undertaking, in all respects sufficient, unless it was fatally defective for failure, in the sureties' affidavits of qualification, to state as to each that the property stated to be possessed by him was "over and above all his debts and liabilities." The undertaking was, in all respects, approved by the trial judge and duly placed on file. Subsequently the order was set aside on motion of plaintiff's counsel, because the costs awarded her in this court had not been taxed nor paid nor tendered nor any demand for

such taxation been made; and, further, because the sureties neglected to testify as to their possessing property over and above their debts and liabilities as before stated. After the expiration of a year from the rendition of judgment, but otherwise seasonably, an application was made for leave to supply the omission in the affidavits of qualification, basing such application upon affidavits excusing neglect in that regard. The application was denied. Defendants appeal from the order and from the order setting aside the order granting a new trial.

For the appellants there was a brief by *Kronshage, McGovern, Goff, Fritz & Hannan,* attorneys, and *A. M. Spencer,* of counsel, and oral argument by *Mr. Guy D. Goff* and *Mr. Spencer.*

For the respondent there was a brief by *Paul V. Cary,* attorney, and *Henry D. Ryan,* of counsel, and oral argument by *Mr. Cary.* As to the condition in sec. 3092, Stats. (1898), requiring payment of all costs "awarded," not all costs "taxed," they cited *County of Cook v. Calumet & C. C. & D. Co.* 131 Ill. 505, 19 N. E. 46; *Dawson v. Shillock,* 29 Minn. 189, 12 N. W. 526.

MARSHALL, J. The trial court erred in vacating the order for a new trial upon the ground that the sureties in their affidavits, subjoined to the undertaking, failed to state that the property possessed by each was "over and above all his debts and liabilities."

True, sec. 3092, Stats. (1898), prescribing the conditions upon which a new trial in an ejectment case may be obtained, provides that the sureties shall justify their responsibility in the same manner as bail on arrest, and sec. 2704, Stats. (1898), as amended by ch. 159, Laws of 1903, provides that such bail as qualification must be worth the amount of property specified over and above all his debts and liabilities, but sec. 3092 does not provide that the sureties therein mentioned

shall possess the same qualification as bail on arrest. The undertaking with sufficient sureties must be in such sum as the court shall direct and the sureties must justify their responsibility in the same manner as bail on arrest. The manner of justification of such bail is provided for by sec. 2705 and contemplates an examination under oath before the judge, the examination to be reduced to writing and signed by the surety, if required by the party for whose protection the undertaking is given.

The meaning of sec. 3092 in connection with sec. 2705, is that the applicant for a new trial shall file an undertaking with sureties as directed by the court, subject to subsequent justification, if desired under such section, and that, upon the examination, on such justification, satisfying the judge, he shall so adjudge and annex the examination of the sureties to the undertaking, indorse his allowance thereon, and cause the papers to be filed as required in sec. 2706.

We see no escape from the conclusion that sec. 2704 as to qualification of bail, to which sec. 3092 does not refer at all, and secs. 2705 and 2706 as to the manner of justification and determination, to which sec. 3092 does refer, are separate and distinct as regards the latter section. That was not amended by the law of 1903.

Qualification is one thing, justification and manner of justification are other things. Sec. 3092 makes no reference to the former except as it leaves the matter to the trial judge to be fixed by the order for the new trial or otherwise as was done in this case. The order required the sureties to "justify their responsibility as required by law." The trial judge meant by such language, satisfy him in the first instance of their responsibility subject to being required to justify on notice as provided in sec. 2705, Stats. (1898). That is evident from the fact that the undertaking with the alleged faulty affidavits was approved by the judge. We cannot doubt but that the undertaking, so approved, fully complied

with sec. 3092 subject to "justification," subsequently, as the subject of "justification" is treated in secs. 2705 and 2706. There the term is used in its common-law sense of a proceeding, on notice, before a magistrate to establish qualification as bail. Nothing of that sort is contemplated by our statute, unless the sufficiency of the undertaking is excepted to.

The learned circuit judge very naturally held, on the motion to vacate the order for a new trial, that the undertaking was not sufficient, by reason of what was said in *Newland v. Morris,* 113 Wis. 394, 89 N. W. 179. The court there confused qualification with mere procedure on justification, reaching the conclusion, because the subject of such procedure is incorporated into sec. 3092, that the subject of qualification covered by the preceding section is likewise so incorporated. We are now satisfied that such conclusion is clearly wrong and should be corrected, which must be regarded as done by the result of this case.

It is the opinion of the court that the order setting aside the order vacating the judgment cannot be sustained upon the ground that the costs to which respondent was entitled on the appeal to this court were not paid, since by fault of respondent opportunity to pay the same never existed. It would be singular if the beneficent purpose of the statute, as regards allowing a person a second opportunity to judicially establish his right to real estate before being forever foreclosed thereof, could be defeated by neglect of his adversary to have his costs seasonably taxed. Since the *remittitur* filed in the office of the clerk of the circuit court showed that no costs had been taxed, respondent was estopped from efficiently claiming noncompliance with the statute as regards paying the same as a condition of a new trial. Upon its appearing to the trial court that such costs had not been paid but that nonpayment was without fault on the part of appellants, it would have been good practice to have modified the order for a new trial, making the same conditioned upon payment of such costs within

a reasonable time after they should be taxed, treating the time for payment as thus extended, under the general power of the court, on motion and for good cause shown, in discretion and upon such terms as may be just, to allow any proceeding to be taken after the time thereof limited by statute has expired, except the time for taking an appeal. Sec. 2831, Stats. (1898).

The foregoing indicates that the appeal from the order vacating the order for a new trial must be substantially disposed of in favor of the appellants.

The appeal from the order refusing leave to remedy the supposed imperfection in the undertaking is of little importance except on the subject of costs. It involves the question of whether it is competent to permit a defective undertaking given under sec. 3092, Stats. (1898), to be amended after the expiration of the year limitation upon the right to a vacation of the judgment and order for a new trial. It appears that permission to amend was refused because of supposed want of power to do otherwise. Conceding that the power existed, so strong a case was made for exercise thereof that permission to amend, very clearly, should have been granted.

We are unable to discover any ground for the position that power does not exist to permit such an amendment, even after the expiration of the year period. The language of sec. 2831 is very broad. It makes but one exception, *i. e.* the extension of time for taking an appeal. Under that, permission to do many acts in a cause after the time limited therefor has expired has been held proper. As for examples: *Smith v. Smith,* 19 Wis. 522; serving a proposed bill of exceptions and settling the bill, *Kelly v. Fond du Lac,* 29 Wis. 439; *Pellage v. Pellage,* 32 Wis. 136; *Wood v. Blythe,* 42 Wis. 300; filing exceptions to the judge's findings of fact, *Wis. River Imp. Co. v. Lyons,* 30 Wis. 61; *Ottillie v. Wæchter,* 33 Wis. 252; *Milwaukee Co. v. Pabst,* 64 Wis. 244, 25 N. W. 11.

In the last case cited the court remarked:

"The statute (sec. 2831, R. S.) authorizing the court on motion and good cause shown, in discretion and upon terms, to allow any proceeding to be taken after the time limited by the statute, has but one exception, and that is for an appeal."

The broad power under discussion has not always been fully appreciated and sometimes refusal to exercise it has been sustained in such a way as to indicate absence of power, instead of proper exercise of discretion in refusing to grant relief. In *Cameron v. Sullivan,* 15 Wis. 510; *Evans v. St. Paul F. & M. Ins. Co.* 54 Wis. 522, 11 N. W. 594; and *Miller v. State,* 77 Wis. 271, 45 N. W. 1129, it was held that a bill of exceptions could not be settled after the expiration of the time limited for taking an appeal, even in aid of an appeal seasonably taken. *Ray v. Hixon,* 90 Wis. 39, 62 N. W. 922, is to the same effect. In *Shafer v. Eau Claire,* 105 Wis. 239, 243, 81 N. W. 409, such cases, so far as they deny the power of the court in such matters, were overruled. We assume the learned circuit judge supposed—on the strength of the doctrine which was displaced in 1890, that when the time shall have expired to do an act which would be ineffective unless some other act were done, and the primary thing occurs within the time, but not the secondary one, as in case of taking an appeal within the two-year limitation, but failure to settle the bill of exceptions necessary to present the error relied on, the court is powerless to relieve the party, requiring such bill, from his default—that the undertaking under sec. 3092, Stats. (1898), could not, under any circumstances, be perfected after the year period. That was a mistake, as we have seen. Leave to cure the supposed defect in the undertaking should have been granted.

By the Court.—The order vacating the order for a new trial is modified so as to provide that the order vacating the judgment and granting the new trial shall be void and of no effect unless defendants pay the costs awarded plaintiff upon

the former appeal to this court, within ten days after written notice of the taxation of such costs and the amount thereof, if such notice shall be given within sixty days after the filing of the *remittitur* on this appeal in the office of the clerk of the circuit court, and in case no such notice shall be given within such time, the order for a new trial shall have full force without payment of such costs. The order refusing leave to amend the undertaking is reversed.

DAVIS, Respondent, vs. WILLIAMS and wife, imp., Appellants.

March 12—March 30, 1909.

Mortgages: Leasehold interest: Foreclosure: Purchasers assuming mortgage.

As against purchasers of a leasehold and attached buildings and machinery who agreed to assume and pay a mortgage thereon as part of the purchase price, the property may, on foreclosure, be charged with the amount of the debt and its sale ordered in case of nonpayment.

APPEAL from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

Action to foreclose mortgage given by C. C. Fritz August 18, 1894, to secure the payment of $750, covering all right and interest under a twenty-year lease of a specific tract of land, together with certain personal property and mill machinery, same to be removed and placed in the mortgagor's proposed mill which was to be erected on the land above mentioned; the mortgage also to cover all erections, additions, appliances, machinery, tools, and implements at any time connected with the mill to be so erected; the mortgage reciting that said personal property, which consisted of the boiler, engine, and machinery constituting a sawmill belonging to the

mortgagee, had been sold to the mortgagor to be removed from its former location by the latter, and that the purchase price thereof constituted the consideration for the mortgage.

Upon the trial it appeared that said mill machinery and appliances were so removed, and, with some additional machinery and appliances, placed in a mill upon the leasehold premises, which, by the way, were held under a twenty-year lease at annual rental. Most of the machinery was of a permanent character and firmly attached either to the ground or to the mill structure. About two years afterward the mill building was destroyed by fire, leaving much of the fixed machinery suitable for use, although some of it was destroyed or ruined. A new building was constructed about it and some new machinery put in, and the premises continued to be occupied as a mill by Fritz under an agreement with plaintiff that, in consideration of forbearance and of a deduction of $50 from the mortgage debt, all such new structures and machinery should be subject to his mortgage. In 1898 the mill property was sold by Fritz to the appellants *Williams,* which conveyance, as the court finds, was made with full knowledge on the part of appellants of the existence of said mortgage, and that they agreed to pay the same as part of the purchase price of said property. The conveyance from Fritz to *Williams* was accomplished by bill of sale describing all personal property, machinery, and buildings and by manual delivery to the latter of the lease and by surrender of possession, all as one transaction. Plaintiff, soon after its execution, recorded his mortgage with the register of deeds and also filed it as a chattel mortgage with the proper town clerk, but failed to continue it by affidavits, so that as a chattel mortgage it had suffered the expiration of validity resulting from such failure.

The court rendered judgment of foreclosure and sale of said leasehold interest in the real estate and the machinery and buildings thereon in the usual form of real-estate mortgages,

but denied any personal judgment for deficiency. From such judgment the defendants *Williams* appeal.

For the appellants there was a brief by *Olen & Olen,* and oral argument by *O. L. Olen.*

For the respondent there was a brief by *Eberlein & Eberlein,* and oral argument by *F. A. Eberlein.*

DODGE, J. Examination of the evidence discloses abundant support for the finding that appellants purchased the leasehold interest and the machinery and buildings attached thereto, not only with full knowledge of plaintiff's mortgage, but under an agreement to assume and pay the same as part of the purchase price. This fact completely answers and disposes of all appellants' objections to the judgment charging the property in their hands with the amount of that debt and ordering a sale thereof in case they do not pay it.

By the Court.—Judgment affirmed.

STEBER, Administrator, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

March 12—March 30, 1909.

Railroads: Negligence: Killing of car-repairer: Duty of employer to guard against dangers: Rules and regulations: Signal flag on track: Questions for jury: Special verdict: Specific questions: Harmless error: Instructions to jury: Credibility of witnesses: Curing error.

1. The business of repairing cars standing on repair tracks should be conducted by a railway company with such precautions, including the making and enforcing of proper rules and regulations, as will reasonably guard employees engaged therein against avoidable dangers.
2. In an action for the death of a car-repairer who was killed by the switching of other cars against the one under which he was at work, it is *held* upon the evidence that it was a ques-

tion for the jury whether a signal flag or board had been put up by the deceased before such car, as required by the rule of the railway company.

3. Refusal to submit in the special verdict specific questions as to whether the deceased had placed such a car-repairer's signal on the track before he went to work, and whether such signal was in place when the other cars were switched onto that track, was not prejudicial error in this case, in view of the instructions given on that subject in submitting the general question as to contributory negligence of the deceased; but submission of such specific questions would have been proper and helpful.

4. A charge to the jury which in effect told them they might reject the testimony of any witness if they found reasons satisfactory to their own minds for so doing, even though it had been admitted by the court as relevant and material to the issues, was erroneous.

5. A charge that if the jury found that the interest of a witness in the case was such that he testified falsely they might throw out his testimony, was erroneous,—the true rule being that if the jury believed a witness had testified wilfully falsely in regard to any matter material to the case they had the right, if they saw fit, to reject all of the evidence of such witness not corroborated by some credible evidence produced.

6. The errors committed in giving the above-mentioned separate and distinct portions of the charge in submitting separate issues, were not cured by subsequent general instruction to the jury respecting their duty to determine the weight of evidence and credibility of witnesses.

APPEAL from a judgment of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Reversed.*

This is an action to recover damages for the death of Jacob Zahradnik, a car-repairer employed by the defendant. The general direction of the railroad tracks maintained by the defendant at Antigo, Wisconsin, is north and south. On the east lie its main track and switch tracks and on the west lie the machine-shop tracks. Between these sets of tracks lie three parallel tracks which are used as repair tracks. These repair tracks are numbered from the east and are known as Nos. 1, 2, and 3. These tracks are connected at the north ends by a lead track and thereby with the other tracks. On the morning of June 7, 1906, the intestate was engaged in re-

pairing a defective brake-beam on the southernmost of seven cars on repair track No. 1. He had been working there for ten or fifteen minutes when other cars were backed onto this track by a switching crew. The cars on the track were struck, and the car under which the decedent was working was moved about twenty inches, one of the wheels passed over him, and he was instantly killed.

The defendant claims that the deceased failed to observe a rule of the company requiring car-repairers to place a blue flag or board before the car or train on which such repairers may be at work. The members of the switching crew testified that they had looked but saw no flag, and that in fact none was there. On behalf of the plaintiff an uncle of the deceased testified that shortly before the accident he passed by this place and observed that a flag was in front of the cars on track No. 1. The evidence as to how long before the accident this witness passed by and whether or not this was previous to the time during which the deceased was occupied with this particular bit of repairing, is not very definite; yet it tends to show that the signals described by the witness were in place preparatory to repairing the cars on track No. 1 a short time before the accident.

The jury returned a special verdict, finding, in answer to the questions therein, that Zahradnik's death was proximately caused by the negligence of the defendant and that he was not guilty of any want of ordinary care contributing thereto. This is an appeal from the judgment on the verdict as so found.

Edward M. Hyzer, for the appellant.

For the respondent there was a brief by *T. W. Hogan* and *Goodrick & Goodrick,* and oral argument by *Mr. Hogan* and *Mr. A. B. Goodrick.*

SIEBECKER, J. The court properly refused to nonsuit the plaintiff. At this stage of the trial it appeared that the de-

ceased had been employed as a car-repairer for the defendant and at the time of the accident was employed by its direction under a car placed on one of its repair tracks in defendant's yards, and that while so engaged in his duty another car was switched onto this repair track and collided with the car under which deceased was at work, moving it and thereby causing his death. This state of the proof was pregnant with a carelessness in the conduct of defendant's business which exposed deceased to dangers and constituted negligence warranting the conclusion that it proximately caused the accident and injury. The business at which deceased was engaged was independent of that performed by the switchmen, and the exercise of due care required that it be conducted by the master with such precautions as to reasonably guard deceased against such dangers. Among such precautions are the making and enforcing of such rules and regulations for its conduct as to afford reasonable protection against avoidable dangers to those engaged in the business. The facts presented by the evidence when the nonsuit was determined were such that the jury would have been warranted in finding that defendant negligently omitted to promulgate any rules or regulations for warning switchmen and the decedent of the dangers incident to conducting the business they were engaged in, and which in the exercise of reasonable care would have guarded them against such dangers. *Polaski v. Pittsburgh C. D. Co.* 134 Wis. 259, 114 N. W. 437.

The appellant claims there is no credible evidence tending to show that the car which decedent was repairing when he was injured was protected by a blue flag or board signal to warn the other employees, as required by its established rules, of his dangerous situation. It appears that the defendant had an established rule that such signals were to be placed on the repair tracks in front of the cars thereon when repairing was being done to warn others not to move or disturb them, thus avoiding injury to car-repairers, and that it was

the duty of the car-repairers to put up such signals or to see that they were up for their protection. The contention is that no such signals were placed on the repair track or cars thereon while decedent was at work repairing the car, by which he was injured by switching another car against it and thereby causing it to run over him.

The question is whether there was evidence tending to show that these signals were in place as called for by the rule. The testimony of defendant's witnesses on this point is clear and direct, is to the effect that no such signal flag or board had been put up as the established rule required, and defendant urges that there is no credible evidence to contradict it. The argument is that the only testimony bearing on this subject in conflict therewith is that of the witness Steffen, which, it is urged, is insufficient to raise an issue of fact for the jury. The record shows as to this testimony that this witness, an uncle of the deceased, was employed with his brother by the defendant as a section hand; that shortly before the accident the witness and his brother returned to the yard on a handcar to have a broken jack repaired at the shop in the yards; that when they came near the lead track above mentioned he looked down the repair tracks toward the shop with a view to passing over one of the repair tracks to get near the shop; and that he then saw a signal flag up on each of the repair tracks, and therefore did not attempt to run on either of them, but passed over a yard track, he doing the propelling of the car while his brother opened and closed the switches. It is admitted that this brother did not observe any signal flags while going on this trip. Steffen also testified that he observed the signal flags again as he proceeded on the switch track to the shop. The evidence of another employee is that he had observed the deceased coming from the north end of the cars on the car track at which he worked when injured and where the flag would be placed under the rule. The foreman at the inquest stated in effect that the repair hands put up a signal flag on

the track where deceased was injured that morning before they started repairing cars and that it was not removed before the accident. This he denied on the trial. In the light of this evidence we cannot say that there was no credible evidence for a jury to find that a signal flag was up on the repair track or cars where plaintiff was working when he was injured. We are persuaded that the substantial conflict in the evidence on this point was for solution by a jury and that the court did not err in submitting the issue to them.

Defendant requested the court to submit as part of the special verdict a direct inquiry as to whether or not the deceased placed such a car-repairer's signal on the track or cars before he went to work, and whether or not one was in place when the switching crew switched cars onto this track. The court rejected the request, but submitted the general question of whether or not the deceased was guilty of contributory negligence, and instructed the jury that an affirmative answer to the question so submitted depended on whether or not there was a warning signal on the track or cars at the north end of the track. In the light of this instruction their attention was specifically directed to the point that they must find that the warning signal was up as required by the rule to find decedent free from contributory negligence. In effect this covers the exact inquiry embraced in the requested questions, and it must be held that the jury expressly found by their answer to the fourth question of the special verdict that the signal was placed as the rule required. Under the instructions the verdict necessarily covers the specific issues of fact embraced in the requested questions.

Under the circumstances the refusal to submit the requested questions is no prejudicial error. It should, however, not be understood that it would have been improper if the trial court had required the jury to answer the requested questions in addition to those embraced in the verdict. It appears that the issuable fact on this phase of the case practi-

cally involved only the point as to whether or not the car-repairer's signal had been put up as required by the rule of the company, which was the exact inquiry of the requested questions. In view of the evidence the court very appropriately might have required the jury to find specifically upon this fact. Submission of it and a direct answer thereto, it seems to us, would have aided the court and have made the record show clearly that the jury specifically resolved this controverted and material issue of fact—a desirable result under the circumstances.

An exception is urged to the following instruction:

"You may reject the testimony of any witness in this case if you find reasons satisfactory to your mind for doing so, but you must have those reasons. You cannot of your whim or caprice throw out testimony of any witness who has testified here. If you find anything in the manner in which a witness gave his testimony, if you find that his interest in the case is such that he testified falsely, or if you find he was mistaken, or if you find any other satisfactory reason to you for throwing out his testimony, you may do so. But you must not do it unless you find such reason."

This is claimed to be erroneous because the jury were thereby informed that they could disregard and reject testimony upon any speculative or imaginary ground, and in effect the jury were authorized to reject relevant testimony adduced by the parties, which they were entitled to have considered by the jury in resolving the issues of fact. The instruction confuses the function of the jury to determine the probative effect of testimony legally before them with that of the court in determining its admissibility as evidence bearing on the fact in controversy. A part of the instruction informs the jury on considerations going to the weight or probative force of the evidence, while another part authorizes them to totally reject evidence for reasons satisfactory to them, though it had been admitted as relevant and material to the issues. This is plainly erroneous, in that it informed the jury that they were authorized and permitted to wholly disregard evi-

dence for speculative and unfounded reasons, though the court had received and submitted it to them as relevant and material evidence.

It is further averred that the instruction specifically misstates the rule governing the rejection of the testimony of a witness who wilfully testifies falsely. They were informed that if they found a witness whose interest in the case was such that he testified falsely, "they could reject his testimony." This is an erroneous statement of the rule for their guidance under such circumstances. The rule stated in *Allen v. Murray,* 87 Wis. 41, 57 N. W. 979, as correct and appropriate to guide the jury under such circumstances is, that "if they believed a witness had testified wilfully falsely in regard to any matter material to the case, the jury had the right, if they saw fit, to reject all of the evidence of such witness not corroborated by some credible evidence produced." See, also, *Hart v. Godkin,* 122 Wis. 646, 100 N. W. 1057; *F. Dohmen Co. v. Niagara F. Ins. Co.* 96 Wis. 38, 71 N. W. 69.

It is argued that the subsequent instruction given to the jury respecting their duty to determine the weight of evidence and credibility of witnesses corrected any erroneous impression communicated to the jury in the above-quoted instruction. We find no merit in this contention. These portions of the charge are separate and distinct and were applied in submitting separate issues. The nature of the controversy and the sharp conflicts in the testimony respecting compliance with the rule as to placing warning signals made it especially important that the jury give proper consideration to all the evidence and its probative force. These erroneous instructions would naturally tend to mislead the jury by permitting them to disregard proper and material testimony in resolving this dispute. Such a result might seriously prejudice appellant. We are constrained to hold that the error committed necessitates a new trial.

By the Court.—Judgment reversed, and the cause remanded for a new trial.

SCHOETTE, Appellant, vs. DRAKE and another, Respondents.

March 12—March 30, 1909.

False imprisonment: Justification for arrest: Delay in bringing before magistrate: Questions for jury: Evidence: Admissibility: Original pleading as admission.

1. In an action for false imprisonment, in which defendants alleged justification of plaintiff's arrest on the ground that he was drunk and disorderly, the questions whether plaintiff was, at the time of the arrest, violating any law or ordinance, and whether there was unreasonable delay in bringing him before a magistrate, are *held*, on the evidence, to have been for the jury.
2. Where an officer makes an arrest without a warrant, it is his duty to take the person arrested before a magistrate without unreasonable delay.
3. In an action for false imprisonment the criminal complaint made before the municipal court against the plaintiff was admissible in evidence, when offered by him, as bearing upon the credibility of the evidence of the defendants and the cause of the arrest.
4. Where an amended pleading has been substituted for the original one, the latter may be put in evidence as an admission of the party.
5. Upon the question whether a person was drunk and disorderly at about 5 o'clock p. m. so as to justify his arrest at that time, evidence that during most of the day he had been in saloons, drinking and at times noisy, boisterous, and quarrelsome, was admissible.

APPEAL from a judgment of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Reversed.*

This action was brought to recover damages for false imprisonment. The complaint charges, in effect, that on the 13th day of March, 1908, at the city of Antigo, Wisconsin, the defendants unlawfully and maliciously imprisoned the plaintiff and restrained him of his liberty without right or authority and against his will, whereby he sustained damages in the sum of $5,000. The answers of defendants deny the material allegations of the complaint and allege justification for the arrest on the ground that the plaintiff was drunk and

disorderly in the city of Antigo, contrary to the statutes of the state and the ordinances of the city, and that the defendant *Drake* was a peace officer in said city and arrested the plaintiff in the lawful discharge of his duty. The defendant *Hill* answered originally by general denial, and afterwards amended his answer by plea of justification to the effect that plaintiff was intoxicated and disturbing the peace, and that he assisted the defendant *Drake* in making the arrest, and arraigned the plaintiff the following morning before the municipal court and complained against him, and that he was ignorant of the grounds for the arrest made by defendant *Drake*. The defendant *Drake* first answered by way of justification that the plaintiff was creating a disturbance on the streets and that he arrested him under the ordinances of the city, but in his amended answer justified the arrest under the ordinances and also alleged that at the time of the arrest plaintiff was intoxicated and disorderly.

At the close of the testimony the court, on motion of defendants, directed a verdict in their favor and against the plaintiff, dismissing the complaint with costs. Judgment was entered accordingly, from which this appeal was taken.

For the appellant there was a brief by *Goodrick & Goodrick*, and oral argument by *A. B. Goodrick*.

For the respondents there was a brief by *Morson & McMahon*, and oral argument by *H. F. Morson*.

KERWIN, J. The principal inquiry upon this appeal is whether the court below erred in directing a verdict for the defendants. This raises the question whether there was sufficient evidence to carry the case to the jury. The vital issues raised by the pleadings and litigated on the trial were (1) whether on the 13th day of March, 1908, when plaintiff was arrested, he was violating any ordinance of the city of Antigo or any law of the state of Wisconsin; (2) did the defendants unreasonably detain the plaintiff in jail after the arrest?

The plaintiff went to the city of Antigo in the forenoon of the day named, tied his team on the street, and left them until late in the afternoon, when they were taken by defendant *Hill* and put in a barn. During the day and until shortly before the arrest the plaintiff spent most of his time in saloons. During the afternoon defendant *Drake* was called to one of the saloons to suppress a disturbance and put plaintiff out of the saloon, which he did. There is some evidence of boisterous conduct on the part of plaintiff at the saloon to which defendant *Drake* had been called. This was during the afternoon of the day in question. The evidence tends to prove that late in the afternoon, about 5 p. m., when *Drake* arrested plaintiff, plaintiff was in an intoxicated condition, noisy and boisterous, using obscene and abusive language, and creating a disturbance on the street, contrary to the provisions of the ordinances of the city of Antigo. The ordinances provide that the policemen and marshals shall have power, and it shall be their duty, to arrest all persons violating any law or ordinance of the city and confine them until a reasonable time to bring them before the court to be dealt with according to law. It seems that the city of Antigo is operating under the general charter, which provides that the city marshal or chief of police may arrest, with or without process, every person found in the city in a state of intoxication, or engaged in any disturbance of the peace, or violating any law of the state or ordinance of the city. The defendant *Drake,* after arresting the plaintiff, took him, with the assistance of defendant *Hill,* to the city lockup, and confined him there. *Drake* left the city during the night on business and did not return until the following day, but wired *Hill* to take the prisoner before the municipal court the morning after the arrest, which was done, and complaint lodged against him charging him with an offense.

There is no doubt but that the evidence was ample to support a finding that the arrest was lawful under the charter

and ordinances of the city of Antigo, but the question is whether the evidence was so conclusive as to warrant the court in taking the case from the jury on this point. It is strenuously insisted by counsel for respondents that the evidence upon the part of defendants justifying the arrest was practically undisputed, and we confess there is much force in this position. Yet we are inclined to the opinion upon the whole case made that there was sufficient evidence to go to the jury on the question of whether the plaintiff was, at the time of arrest, violating any law or ordinance.

Upon the second proposition, as to the unreasonable restraint, the case is much more clear. The plaintiff was arrested between 5 and 6 o'clock in the afternoon and put in the lockup and left there until the forenoon of the following day. There is evidence that in the evening, shortly after he was confined, an effort was made to bring him before the court for the disposition of his case or for release on bail, and that the municipal court was open for that purpose; that although defendant *Drake* was in the city and requested to take plaintiff before the court, he neglected to do so, but suffered plaintiff to remain in jail all night and until about 9 or 10 o'clock in the forenoon of the following day. Upon the evidence produced it is clear that the court erred in directing a verdict for the defendants. The law upon the subject is well settled to the effect that where an officer makes an arrest without a warrant, as was done in this case, it is his duty to take the person arrested before a magistrate without unreasonable delay. 3 Elliott, Ev. § 2110; *Green v. Kennedy,* 48 N. Y. 653; *Markey v. Griffin,* 109 Ill. App. 212; *Ocean S. Co. v. Williams,* 69 Ga. 251.

The plaintiff offered in evidence the criminal complaint made before the municipal court in the case of *State v. Schoette,* in connection with the cross-examination of defendant *Hill.* This evidence was ruled out, and the ruling is assigned as error. The complaint offered does not appear to

be in the record. It is therefore difficult to say whether the court below was right or wrong in ruling it out. It appears to have been offered as bearing upon the credibility of the evidence of the defendants, the innocence or guilt of the appellant, and the cause of the arrest. Assuming that it was in the usual form, it was competent as bearing upon the credibility of the evidence of defendants and the cause of the arrest and was therefore admissible. *Parsons v. Harper,* 16 Grat. 64; *Forbes v. Hicks,* 27 Neb. 111, 42 N. W. 898; *Regan v. Jessup,* 34 Tex. Civ. App. 74, 77 S. W. 972; 19 Cyc. 366.

The court also refused to admit in evidence the original answer of defendant *Drake,* or permit counsel to cross-examine him as to allegations in such original answer. Where an original pleading has dropped out of the case by the substitution of an amended pleading, the original pleading may be put in evidence as an admission of the party, and is evidentiary for that purpose. *Schultz v. Culbertson,* 125 Wis. 169, 103 N. W. 234; *Lindner v. St. Paul F. & M. Ins. Co.* 93 Wis. 526, 67 N. W. 1125.

Error is also assigned because the court admitted evidence of occurrences at other times and places than at the time and place of the arrest, on the theory that the defendants had no right to arrest without a warrant after the offense had been committed. It is insisted that evidence of the disturbances created by plaintiff and his unlawful acts similar to those for which he was later arrested was inadmissible. In this case the arrest seems to have been made because of violation of the charter and ordinances of the city of Antigo being committed at the time of the arrest, and we need not consider whether the officer would be authorized to arrest for prior breaches committed in his presence the same day. We think, however, that the evidence regarding the conduct of plaintiff for some time prior to his arrest, and notably regarding the disturbances created by him in a saloon within a couple of hours before the arrest, was admissible. His con-

duct as to drinking, being quarrelsome, noisy, and boisterous during the day of his arrest had a bearing upon the question of disorderly conduct and intoxication at the time of the arrest. There is evidence that he was in saloons most of the day from 11 a. m. until shortly before his arrest, drinking, and at times noisy, boisterous, and quarrelsome. Such acts were so connected with the acts for which he was arrested as to be admissible in evidence. 1 Greenl. Ev. § 108; *Holmes v. State,* 124 Wis. 133, 102 N. W. 321.

By the Court.—The judgment below is reversed, and the cause remanded for a new trial.

ILLINOIS STEEL COMPANY, Appellant, vs. PACZOCHA and wife, Respondents.

January 8—April 20, 1909.

Adverse possession: Tacking possessions: Privity: Hostile claim: Evidence: Parol evidence affecting writings: Finding of fact: Harmless errors: Leases: Presumption as to signature: Specific denial: Disseisin by surveys: Explanatory evidence: Limiting effect: Instructions to jury: Special verdict: Burden of proof: Informing jury as to effect of answers.

1. The privity between successive occupants of land which will permit the tacking of their possessions is not dependent upon any claim, or attempted transfer, of any other interest or title in the land, but is privity merely of physical possession not derived from or in subordination to the true owner; and the only essential of the transfer is that the predecessor passes it to the successor by mutual consent, as distinguished from a case where a possessor abandons possession generally and another, finding the premises unoccupied, enters without contact or relation with the former.
2. Where the possessions of successive occupants other than the true owner join by delivery from predecessor to successor, there is no opportunity for the true owner to become seised, and after twenty years' submission to such inability he becomes barred by sec. 4207, Stats. (1898), irrespective of the terms of sec. 4215.

3. Possession of land and voluntary transfer thereof are physical facts provable by the testimony of an eye or ear witness or any other evidentiary fact or conduct.
4. When the physical fact of possession has existed for the statutory period the law supplies the hostility and adversary intention, subject only to the qualification that such possession was not in fact derivative from and subordinate to the true title.
5. When defendants have proved as facts that they and their predecessors in privity have for twenty years continuously occupied by actual, open, notorious, and exclusive possession such as the premises were adapted to, and as was reasonably sufficient to attract attention of the true owner and put him on inquiry as to the nature and extent of the invasion of his rights, they have, by force of sec. 4210, Stats. (1898), proved that "adverse" possession which, both by sec. 4207 and sec. 4215, bars a recovery by the true owner and incidentally creates title in them.
6. The evidence in this case is *held* to sustain a verdict to the effect that there was privity of possession between defendant and his predecessors in occupancy for more than twenty years before the commencement of the action.
7. There is privity of possession between one who lived upon land with his family and the members of the family who continued to occupy it as a home after his death.
8. Where parol evidence was offered to show an agreement, the decision of the trial court on the preliminary question as to whether such agreement was reduced to writing has the weight of an ordinary finding of fact, not to be disturbed unless contrary to a clear preponderance of the evidence.
9. A mere receipt for money, or a mere conveyance which is unilateral and does not attempt to state the whole agreement made, does not exclude parol evidence as to other terms thereof.
10. The admission of parol evidence as to a conveyance or release to defendant by a person claiming some interest in the land in suit, is *held* not a prejudicial error where, at the time of such conveyance, defendant had been in complete possession of the land for some time and his right did not rest upon the conveyance but upon privity of possession with his predecessors in occupancy.
[11. Whether an instrument bearing the name "Eva Stein" "purports to have been signed or executed" by Eva Steen, within the meaning of sec. 4192, Stats. (1898), not determined.]
12. The evidence in this case is *held* to sustain a finding by the jury that defendant's predecessor in possession of the premises did not sign a lease whereby her possession became subordinate to the true title.

13. In support of the verdict of a jury, the testimony of a witness, as to an instrument and signature before her, "I did not write that signature and did not authorize any one to write it for me," is *held* a specific denial of the signature within the meaning of sec. 4192, Stats. (1898), although by reason of confusion in other answers of the witness the jury might have understood either that she denied the act or that she merely denied memory of it.
14. The presence of surveyors locating points upon an island in a city, some of them upon the premises in suit, which consisted of a lot fenced and occupied as residence and garden, and the failure of the occupant to protest against the entry upon his premises, do not conclusively show a disseisin of the occupant, breaking the continuity of his adverse possession, especially where the acts of the surveyors are not clearly shown to have come to his knowledge.
15. Evidence of claims made by a person adverse to the rights of defendant in land occupied by him was admissible as preliminary to and explanatory of a settlement by which such person released his rights to defendant.
16. Failure to give instruction limiting evidence to a certain effect was not error where there was no request for such instruction.
17. It is not error to instruct as to where the burden of proof is upon questions submitted for special verdict, although the jury are thereby informed as to the effect of their answers.
18. Instruction as to the burden of proof upon an immaterial question is harmless.

APPEAL from a judgment of the circuit court for Milwaukee county: OREN T. WILLIAMS, Circuit Judge. *Affirmed.*

Action of ejectment commenced July 1, 1907, to recover a tract of land on Jones Island claimed by the defendant to have been held by himself and privies in adverse possession for more than twenty years prior to the commencement of the action. The premises are the same tract of which a part was transferred by this defendant to Michael Jeka, and involved in *Ill. S. Co. v. Jeka,* 119 Wis. 122, 95 N. W. 97, though the evidence in this case is not identical with that in the *Jeka Case.*

Upon the trial plaintiff's paper title was admitted. The defendant, to establish adverse possession, proved that one John Steen built upon the tract in 1875 and inclosed it, as-

serting ownership of it. The lot was largely under water, and was gradually filled to above the surface throughout the possession of all parties named. Steen indicated the limits of his possession by fences and what are called "docks." After moving into the house as his homestead, in the fall of 1876 he died, leaving his widow, Eva Steen, and a young son, who continued to occupy and improve the premises, except that the son at times went to board with relatives living in other parts of Milwaukee. Eva Steen married August Cenova in September, 1877, and they resided together upon the premises until 1884, when she sold the premises to one Adam Paczocha, a son of the defendant *Joseph Paczocha, Sr.*, who had not then reached Milwaukee, for the latter. The possession of the premises, however, did not change until two or three weeks later, when, defendant having arrived, Eva Cenova and her husband delivered over the possession not only of the dwelling house, but of the barns and outbuildings, the garden, and all included within the fences which had marked the previous occupancy, to the defendant, with the statement that such was the property which Adam Paczocha had bought for him. Thereafter *Joseph Paczocha* made his home with his family upon the premises, Mrs. and Mr. Cenova boarding with him for several weeks thereafter. *Paczocha* gave permission to his son-in-law, Michael Jeka, and also to his son, Joseph Paczocha, Jr., to build houses on the original premises, which, with the ground they stand on, are not included in the present action. He continued residence upon the premises up to about 1895, and since then has leased them to tenants. An attempt was made to show taking of a lease by Eva Steen after her first husband's death in 1876 from the predecessor in title of the plaintiff.

The jury, by a special verdict, found (1) that John and Eva Steen commenced occupancy of the premises described in the complaint more than twenty years before the com-

mencement of the action; (2) that Eva Steen did not sign or authorize the signature of the lease from the Wisconsin Iron Company; (3) that Joseph Steen, the son of John and Eva Steen, did not at any time before the sale to *Paczocha* abandon the premises with the intention of surrendering possession thereof; (4) that Eva did not hold to the exclusion of Joseph Steen; (5) that defendants and their predecessors usually cultivated or improved the premises continuously for a period of twenty years or more immediately preceding the commencement of the action; (6) that defendants and their privies, John Steen, Eva Steen, Joseph Steen, Eva Cenova, and August Cenova, have for more than twenty years next prior to July 1st occupied the premises by such actual, open, notorious, exclusive, and continuous possession as such premises were adapted to and that was reasonably sufficient to attract the attention of the true owner and put him on inquiry; (7) that the defendants at the time of the commencement of the suit were in possession; and (8) that they did not unlawfully withhold from the plaintiff the possession. Whereupon, after various motions attacking the verdict, judgment was entered for the defendants, from which the plaintiff brings this appeal.

For the appellant there was a brief by *Kronshage, McGovern & Fritz* and *John H. Paul,* attorneys, and *Walter D. Corrigan,* of counsel, and oral argument by *Mr. Corrigan.*

For the respondents there was a brief by *Fiebing & Killilea,* attorneys, and *Moritz Wittig* and *Henry J. Killilea,* of counsel, and oral argument by *Mr. Wittig* and *Mr. Killilea.*

The following opinion was filed January 26, 1909:

DODGE, J. 1. The first error assigned raises the sufficiency of evidence to establish privity between the several possessors so that their possessions may be tacked. The subject of privity has been so frequently and elaborately treated in nearly all points of view within a few years past that we

can hardly hope that more words can make plain the principles to one who misunderstands those already uttered. One mistake in which appellant seems to persist is that the privity in question has some relation to title, and that claim of title has some relation to possession. Neither is in any material sense correct. The question is purely one of physical possession, except for the case of actual subordination to the true owner. If there has been that physical possession, it matters not what nor how varied the claims of title set up meanwhile, nor indeed the absence of any. The privity between successive occupants required for the statute of limitations is privity merely of that physical possession, and is not dependent on any claim, or attempted transfer, of any other interest or title in the land. *Bishop v. Bleyer,* 105 Wis. 330, 81 N. W. 413; *Ill. S. Co. v. Budzisz,* 106 Wis. 499, 82 N. W. 534; *Ill. S. Co. v. Jeka,* 119 Wis. 122, 95 N. W. 97; *Ill. S. Co. v. Budzisz,* 119 Wis. 580, 97 N. W. 166; *Clithero v. Fenner,* 122 Wis. 356, 99 N. W. 1027; *Closuit v. John Arpin L. Co.* 130 Wis. 258, 110 N. W. 222. Counsel's confusion is illustrated by his quotation from the *Budzisz Case,* 106 Wis. 515, 82 N. W. 534: "The calls of a deed . . . limit the right as a matter of law." But they do not limit the fact, and, if the fact of possession persist through the appointed time, new rights grow up. If the possessions join by delivery from predecessor to successor, there is no opportunity for the true owner to become seised, and, after twenty years' submission to such inability, he becomes barred by sec. 4207, Stats. (1898), irrespective of the terms of sec. 4215, Stats. (1898). Possession and voluntary transfer thereof are physical facts provable by the testimony of an eye or ear witness or any other evidentiary fact or conduct. The only qualification to the possession is that it must be such as to exclude the true owner; not derived from or in subordination to him. The only essential of the transfer is that the predecessor passes it to the successor by mutual con-

sent, as distinguished from the case where a possessor abandons possession generally, and another, finding the premises unoccupied, enters without contact or relation with the former, as in *Larzelere v. Wood,* 136 Wis. 541, 117 N. W. 1013. Such are the rules declared and enforced by the above decisions of this court, and it is but misdirected industry to quote from or cite our own earlier utterances, or those of other courts, in apparent derogation, which are either overruled or discredited, of which confessedly there are some.

Considering the evidence in light of these rules we find: John Steen built the house, inclosed the premises so as to mark limits of possession, and moved into the house with his family, and later died. His family, consisting of wife and minor son, remained there, continuing to occupy the premises as a home and to exercise all acts of ownership and improvement thereon. Privity between them and John Steen is, of course, clear. *Mielke v. Dodge,* 135 Wis. 388, 115 N. W. 1099. Their occupation continued not adverse to each other, but clearly excluding possession by any one else. The evidence is that Eva, while admitting rights in the property in John, her son, set up rights at least of occupancy in herself, which she would of course have if her deceased husband's claim of ownership had been well founded. *Mielke v. Dodge, supra.* But, at any rate, she had full possession, just such as an owner would exercise. The next transfer of possession was in 1884, when Eva Steen, then Cenova, surrendered possession to the defendant. She at that time surrendered to him the whole premises, including the house with outbuildings, garden, fences, etc., and she accompanied that act by the statement that that was the property which had previously been sold to his son for him. Not only was there no break or interruption of occupancy, but *Paczocha* went in before Eva Steen went out, she and her husband remaining as boarders for several weeks. This presented a clear case of the joining of possessions; the incoming occupant taking by con-

sent immediately from the preceding occupant, with no possibility for an intervening disseisin. *Ill. S. Co. v. Jeka, supra; Clithero v. Fenner, supra; Closuit v. John Arpin L. Co., supra.* It must be remembered that on this occasion there was no attempt at any written expression of the understanding or intent with which the physical change of possession was made. And, even if there had been, the acts of the parties would still have been so clearly significant of a mutual purpose to transfer the possession of the whole premises as to establish that fact notwithstanding there had been a written conveyance at the same time of some limited portion of, or title in, them. Id. Since that event it is practically undisputed that the defendant, by himself and tenants, has continued the actual possession and enjoyment of the whole premises so received from Eva Cenova with acts of improvement and domination such as to suggest ownership. This evidence is well-nigh conclusive of privity of possession, but for the purpose of this assignment of error it need only tend to establish such fact, which we hold to be the case.

2. In this immediate connection is the very earnest contention of appellant's counsel that no parol evidence of the agreement or understanding of the parties was admissible, because they reduced their agreement to writing; and error is assigned upon the admission of much parol evidence on that ground. This raised a question of competency of certain offered evidence. The court ruled that, until it was shown that the parties had reduced their agreement to writing, oral evidence of such agreement was admissible, which was of course correct. The plaintiff undertook to show by cross-examination and otherwise that at the time Adam Paczocha entered into the agreement for the purchase of these premises such agreement was reduced to writing. Waiving the question whether a writing then made would be in any wise exclusive of parol proof as to the conduct and conversation of the parties at the time of the actual transfer of pos-

session to the defendant *Joseph Paczocha* some two or three weeks later, still the question presented was one for decision by the court preliminary to his ruling on the admissibility of the parol testimony, and the court's decision thereon has the weight of an ordinary finding of fact. *Hupfer v. Nat. D. Co.* 119 Wis. 417, 96 N. W. 809. He evidently reached the conclusion that it had not been established that any such written expression of the parties' agreement had been made, although some kind of a writing was drawn, and decided that because of such failure to prove the preliminary fact the parol testimony should be admitted. In this we can find no error. But one witness testified on the subject, namely, Adam Paczocha; and, while he said in response to a leading question that the agreement was reduced to writing, he explained fully what he meant by that, namely, that he and both the Cenovas told the scrivener about their agreement, and he wrote some paper. Witness had no knowledge as to what was written. That writing had passed out of the manual control of the defendants. Although, apparently, it was in court as a part of a former deposition, neither party chose to offer it in evidence. The burden was upon the plaintiff to prove that it was at least an attempt to put in writing the agreement made, and not some collateral or incidental paper in the course of effectuating the same. So far as the evidence went, it might have been a mere receipt for the money, or, as it probably was, a mere conveyance such as the scrivener deemed necessary to effectuate the agreement or part thereof. Such an instrument, of course, is in its very nature unilateral, and not such an attempt to state the whole agreement as to exclude parol evidence as to other terms thereof. *Twohy v. Estate of McDonald,* 108 Wis. 21, 83 N. W. 1107; *Brader v. Brader,* 110 Wis. 423, 85 N. W. 681; *Seeger v. Manitowoc S. B. Works,* 120 Wis. 11, 97 N. W. 485; *Lathrop v. Humble,* 120 Wis. 331, 97 N. W. 905; *Mueller v. Cook,* 126 Wis. 504, 509, 105 N. W. 1054. Indeed, there

was no proof that such writing was executed or signed by any one. We are unable to hold the court's decision adverse to clear preponderance of the evidence as would be necessary to convict it of error in admitting even the evidence as to the parol agreement made by Adam Paczocha with Eva Cenova. The writing made by Joseph Steen some two months after the change of possession took place is so immaterial to the issues that no prejudice could result from parol evidence as to the making or the terms thereof. Defendant had been in complete possession of the premises for six weeks or more, and no change or modification took place, when, by reason of a settlement between Mrs. Cenova and her son and the payment by her to him of a part of the purchase price, he made such conveyance or release of his interest as the scrivener thought fit to draw. Defendant's right rests, not on the conveyance of any title from Joseph Steen, but on the transfer of possession of the premises. We discover no prejudicial error in admission of the evidence. These views dispose of multitudinous assignments of error upon admission of specific testimony *ejusdem generis.*

3. It is claimed that a lease was taken by Eva shortly after her first husband's death from the plaintiff's predecessor in title, so that her possession from that time was not adverse. We cannot think the evidence of such alleged fact conclusive to overcome the adverse finding by the jury. A lease was produced dated in 1876, bearing the name of "Eva Stein," with nothing to indicate that the signature had been written by any other person for her. A witness was offered who was present when another man went about and sought to obtain leases in large number from residents on Jones Island. He finally admitted that he had no affirmative recollection that the Eva Steen in question wrote that signature, or that it was written in her presence by some one else, or that she gave any authority to any one to write it. At most he had a general memory that they went about on the island and that every-

body either signed or authorized somebody else to sign their names. Eva Cenova testified, with some confusion, evidently resulting from excitement and from inability to either understand questions or express herself, that she did not write that signature, that she did not tell anybody to write it for her, and she did not hold a pencil for somebody to write it. Further, she testified that she was unable to write her name and she was unable to understand English at all, or German to any extent; that she remembered the occasion of one of these men coming to her house soon after her husband's death and asking her for some money, to which she responded that she had none, and he then went away. After he left she understood he came from the rolling mills, or rather went back to the rolling mills, but she did not know whom he represented. In this situation surely the jury had ample evidence from which to find that she did not execute any such lease.

It is, however, claimed that by sec. 4192, Stats. (1898), the instrument proved its own execution *prima facie,* and that she did not, in the language of that section, "specifically deny the signature or execution." Waiving the question whether an instrument bearing a name different from that of a party, neither the same in spelling nor *idem sonans,* "purports to have been signed or executed" by that person, still we think the statute requiring specific denial was fully satisfied. With the instrument and signature before her she stated: "I did not write that signature and did not authorize any one to write it for me." True, the jury might have understood from the confusion of some of the other answers that she did not deny the act, but merely memory of it; equally they might have understood that she did. If so, we can conceive no more direct form of specific denial of execution.

4. A further claim is made that disseisin was accomplished by the owner on three occasions when surveyors, employed by plaintiff or some of its predecessors in title, went

onto the island and made careful surveys locating the houses and making plats, protracting such surveys over some months. The first of these surveys, at least, was made by the city engineer and his assistant, though probably not in their official capacity. The presence of surveyors locating points upon this island, though some of them were upon the identical premises, was not so significant as to conclusively establish invasion of defendant's possession sufficient to constitute a disseisin. In a city such work is so frequent and so frequently under municipal sanction that the failure of an occupant of premises to protest against the entry on his premises for the purpose of measurement or running lines is not necessarily to be construed a submission to a title held by the employer of the surveyors, especially when, as here, the acts of the surveyors are not clearly shown to have come to the knowledge of the occupant. The situation with reference to a lot fenced and occupied as residence and garden is very different from that discussed in *Ill. S. Co. v. Budzisz,* 115 Wis. 68, 86, 90 N. W. 1019, where the adverse possession was a rather vague assertion of sovereignty over a large area of waste land with very inconsiderable and ambiguous acts of domination which might well be deemed contradicted by some months of surveying, driving stakes, etc., over the whole tract. The same surveys were proved in previous cases and not held to be conclusive against continuity of adverse possession. *Ill. S. Co. v. Jeka,* 119 Wis. 122, 95 N. W. 97; *Ill. S. Co. v. Jeka,* 123 Wis. 419, 101 N. W. 399; *Ill. S. Co. v. Bilot,* 109 Wis. 418, 84 N. W. 855, 85 N. W. 402. Indeed, any effect of such surveys as re-entries would seem to be denied by sec. 4209, Stats. (1898), requiring re-entry to be followed by suit within one year.

5. Some evidence that Joseph Steen made claims of ownership either entire or in common with his mother during the time she continued to reside on the premises and while he was boarding elsewhere is assigned as error. There was some evidence that he authorized her occupation for a con-

sideration, hence that he was in possession at the time, which removes the objection urged that declarations as to character of possession are admissible only from one exercising it. Other claims made by the same person adverse to defendant's right were properly admitted as preliminary to and explanatory of the transaction of settlement with him. They might properly, by instruction, have been limited to that effect, but plaintiff made no such request.

Certain other rulings on detail evidence are suggested by appellant with little or no argument in support of the assignments of error. We think all of them either so within the administrative discretion of the trial court or so obviously nonprejudicial that discussion of them is not justifiable in this opinion.

6. Certain instructions are assigned as errors, several to the effect that the burden of proof was on plaintiff or defendant because they informed the jury of the legal effect of an affirmative answer. This criticism is hypercritical. It is not error to so instruct. *Banderob v. Wis. Cent. R. Co.* 133 Wis. 249, 265, 113 N. W. 738.

Instruction that burden of proof was on defendant as to third question, whether Joseph Steen abandoned, was of no prejudice, because the question itself was immaterial. Eva was shown conclusively to have continued actual possession from John Steen's death up to the transfer of it to the defendants independently of any acts of *Joseph.*

A series of errors are assigned upon failure of the court to require the jury to find as a fact that the several possessions were hostile, adverse, and under a claim of title. These present the same confusion as pointed out in the first division of this opinion. The possession needing to be proved and found by the jury is a physical fact, not a state of mind. When the physical condition has existed for the statutory period the law supplies the hostility and adversary intention, subject only to the qualification that such possession is not in fact derivative from and subordinate to the true title.

That is fully established in this case. If defendants have proved as facts that they and their predecessors in privity have for twenty years continuously occupied by actual, open, notorious, and exclusive possession such as the premises were adapted to, and as was reasonably sufficient to attract attention of the true owner and put him on inquiry as to the nature and extent of the invasion of his rights, they, by force of sec. 4210, Stats. (1898), have proved that "adverse" possession which, both by secs. 4207 and 4215, Stats. (1898), bars this action and incidentally creates title in them. *Meyer v. Hope,* 101 Wis. 123, 125, 77 N. W. 720; *Wollman v. Ruehle,* 104 Wis. 603, 606, 80 N. W. 919; *Bishop v. Bleyer,* 105 Wis. 330, 332, 81 N. W. 413; *Ill. S. Co. v. Budzisz,* 106 Wis. 499, 507, 514, 82 N. W. 534; *Gilman v. Brown,* 115 Wis. 1, 5, 91 N. W. 227; *Ill. S. Co. v. Jeka,* 119 Wis. 122, 95 N. W. 97; *Ill. S. Co. v. Bilot,* 109 Wis. 418, 84 N. W. 855, 85 N. W. 402; *Ill. S. Co. v. Budzisz,* 119 Wis. 580, 585, 97 N. W. 166; *State v. Lloyd,* 133 Wis. 468, 473, 113 N. W. 964. Such was the question submitted to the jury.

We think the foregoing consideration of principles disposes, adversely to appellant, of substantially all the assignments of detail errors, except perhaps certain complaints of remarks made by court or defendants' counsel, which do not present matter of sufficient moment to warrant discussion, certainly not to require reversal.

By the Court.—Judgment affirmed.

WINSLOW, C. J., took no part.

Upon a motion for a rehearing there was a brief for the appellant by *Van Dyke & Van Dyke, Walter D. Corrigan, John H. Paul,* and *Theodore Kronshage,* attorneys, and *Kronshage, McGovern, Goff, Fritz & Hannan,* of counsel, and for the respondents a brief by *Fiebing & Killilea,* attorneys, and *Moritz Wittig* and *H. J. Killilea,* of counsel.

The motion was denied April 20, 1909.

STATE EX REL. OHLENFORST, Respondent, vs. BECK, Commissioner, etc., and another, Appellants.

January 9—April 20, 1909.

Statutes: Amendment: Retained provisions: Bakeries: Right to license.

1. **Provisions of a prior law retained in an amendatory act are not deemed to have been repealed and again enacted, but as having existed and continued from the time of their original enactment.**
2. **Sec. 3, ch. 230, Laws of 1903, provided "After the passage of this act no new bakery shall be established in a room the floor of which is more than five feet below the level of the street, sidewalk or adjacent ground." Ch. 486, Laws of 1907 (amending said section and making it sec. 1636—63, Stats.), provided: "After the passage of this act no new bakery . . . shall be established or operated in a room [described as before], nor in any room the ceiling of which is less than eight feet high from the floor." The act of 1907 also provided for the licensing of bakeries. *Held*, that the prohibition in the act of 1903 was continued, not repealed and re-enacted, and that one who in 1906 had established a bakery in violation of the act of 1903 was not entitled to a license to operate it under the act of 1907.**

APPEAL from an order of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

Petitioner seeks *mandamus* to compel the issuance by the commissioner of the bureau of labor and industrial statistics and the state bakery inspector of a license to conduct a bakery at 529 First avenue in the city of Milwaukee. Petitioner duly applied for a license under and pursuant to ch. 486, Laws of 1907. Petitioner alleges that on October 19, 1906, he established a bakery and confectionery at 529 First avenue, city of Milwaukee. He alleges that his bakery is in a clean and sanitary condition and that it conforms to all the provisions of the act providing for the issuance of that license. The license has been refused. It appears that the bakeshop is located in a room in the basement of the building. This basement is divided into three rooms by partitions which

run the entire width of the building. The room in the center is used for the bakeshop. The floor of the basement is five feet ten inches below the level of the street or sidewalk and its ceiling is seven feet from the floor. Along both sides of the building, with a width of from eighteen inches to two feet and extending along that part of the building occupied by the bakeshop, the petitioner has excavated the earth to such an extent that the floor of the bakeshop is four feet nine inches below the level of the bottoms of these trenches. In a prosecution based on an information sworn to by the state bakery inspector for operating a bakery in a room the floor of which was more than five feet below the level of the street, sidewalk, or adjacent ground, the petitioner was found not guilty by the jury. Upon the filing of the petition setting forth the above facts the court issued an order commanding the issuance of the license or that the commissioner and the inspector show cause why they had not done so. The commissioner and the inspector demurred to the petition and moved to quash the alternative writ. The court overruled the demurrer and denied the motion. This is an appeal from the order.

For the appellants there were briefs by the *Attorney General* and *A. C. Titus,* first assistant attorney general, and oral argument by *Mr. Titus.*

For the respondent there was a brief by *Adolph H. Roethke,* attorney, and *Christian Doerfler,* of counsel, and oral argument by *Mr. Roethke.*

The following opinion was filed January 26, 1909:

SIEBECKER, J. Ch. 230, Laws of 1903, provided:

"After the passage of this act no new bakery shall be established in a room the floor of which is more than five feet below the level of the street, sidewalk or adjacent ground."

Any violation of the act was made a misdemeanor and punishable by fine or imprisonment. This provision was

amended by ch. 486, Laws of 1907, providing that thereafter "no new bakery or confectionery establishment shall be established or operated in a room the floor of which is more than five feet below the level of the street, sidewalk or adjacent ground, nor in any room the ceiling of which is less than eight feet high from the floor." This act is entitled "An act to amend secs. 1, 2, 3, 6 and 7, ch. 230, Laws of 1903," etc. The context of the amendment affecting sec. 3 shows that the former provision as to the establishment of new bakeries is continued and a provision prohibiting the operation of these bakeries is added. It also includes confectionery establishments. The petitioner avers that the effect of this amendment was to repeal all of ch. 230, Laws of 1903, and to enact a new law on the subject of the sanitary regulation of bakeries, which is embraced in ch. 486, Laws of 1907. To effect such a result the new legislation must show with reasonable clearness that such was the legislative intent. This we do not find from this chapter. The title declares that it is an act to amend certain portions of the former law and to create new sections. The amendatory act contains many of the provisions of the old act, modifies others, and incorporates new provisions. In dealing with sec. 3, above quoted, the original provision prohibiting the establishment of new bakeries in "rooms the floor of which is more than five feet below the level of the street, sidewalk or adjacent ground" is bodily continued. This presents an instance where the amendment does not change the original provision, but adds others. Under such circumstances the portion so continued is not considered as repealed and again enacted, but as having existed and continued from its original enactment. It is manifest from a comparison of the two enactments that only such parts of the original enactment are repealed as are not embraced in the amendatory act, that the portions retained continued in force from their first enactment, and that the new and changed portions took effect from

the time of the amendatory act. The rule that a re-enactment of an existing statute in substantially the same words operates to continue it is well settled and has been frequently followed by this court. *Fullerton v. Spring,* 3 Wis. 667; *Glentz v. State,* 38 Wis. 549; *Laude v. C. & N. W. R. Co.* 33 Wis. 640; *Bentley v. Adams,* 92 Wis. 386, 391, 66 N. W. 505.

Applying the statute to petitioner's case, it results that he is within the regulations of the original act of 1903, forbidding the establishment of a new bakery unless it is in compliance with the regulations prescribed. Concededly petitioner established his bakery after the passage of this law, and it did not become a legally established bakery under the law so as to warrant petitioner in operating it. The record shows, and it was conceded in oral argument, that petitioner's bakery does not comply with the regulations of the original law, in that the floor is more than five feet below the level of the street, sidewalk, or adjacent ground. It also appears that the ceiling of the bakery is less than eight feet from the floor. Under the facts the defendants, as officers authorized to issue licenses for conducting a bakery, properly denied petitioner's application.

By the Court.—The order appealed from is reversed, and the cause remanded with directions to grant appellants' motion to quash the alternative writ of *mandamus* and to dismiss the petition.

Upon motion for a rehearing there was a brief for the respondent signed by *Henry E. Foelske,* of counsel.

The motion was denied April 30, 1909.

STATE EX REL. HEYL, Appellant, vs. HINKEL, City Clerk, and others, Respondents.

STATE EX REL. WISCONSIN TRUST CO., Trustee, Appellant, vs. HINKEL, City Clerk, and others, Respondents.

STATE EX REL. WISCONSIN TRUST CO., Guardian, Appellant, vs. HINKEL, City Clerk, and others, Respondents.

January 28—April 20, 1909.

Taxation: Mortgages on land, with other security.

1. Sec. 2, ch. 378, Laws of 1903, providing that "whenever taxable real estate shall be subject to mortgage, such mortgage for the purposes of taxation shall be deemed an interest in such real estate and shall be assessed and taxed as such interest in the assessment district in which such real estate is located, and not otherwise," applies to a mortgage on land in this state, to the extent of the value of the land, even though such debt is secured also by a mortgage on land without the state or by a mortgage of personal property.
2. Sec. 9 of said ch. 378, providing that the act shall not apply to mortgages upon property assessed or taxed in special ways, but "shall apply only to mortgages upon property subject to direct assessment and taxation under the general assessment and tax laws of the state," does not exclude from the operation of the act a mortgage on property subject to such direct assessment and taxation merely because it also covers other property.

APPEALS from judgments of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Reversed.*

Certiorari to review the action of the board of review in confirming an assessment against the holders of certain bonds of the Pabst Brewing Company. The facts appearing, without dispute, before the board of review were that each of the relators was a holder of certain such bonds, assessed at a value of about sixty per cent. of their face; that the Pabst Company had outstanding about $3,400,000 face value of such bonds secured by a mortgage or trust deed covering a large amount of taxed real estate, most of which was situated

in the city of Milwaukee, a considerable amount elsewhere in the state of Wisconsin, and about one sixth of the total in other states; that the true valuation of the real estate in Wisconsin considerably exceeded the face of the bonds, and that the assessed valuation of the real estate in Wisconsin considerably exceeded the assessed value of such bonds; that the Pabst Company elected to have the mortgage interest and the fee interest or equity of redemption assessed together without separation in all its Wisconsin lands; and that the assessments placed on said lands were intended to cover the entire title thereof. Upon these facts the several relators, owning together $2,409,000 face value of bonds, were assessed a total of $1,445,000 on account of said bonds as personal property. The circuit court entered judgments affirming the action of the board of review, and from those several judgments the relators appeal.

For the appellants there was a brief by *Thomas M. Kearney,* attorney for *Clara S. Heyl* and *Wisconsin Trust Company* as trustee, and by *Van Dyke & Van Dyke,* attorneys for *Wisconsin Trust Company* as guardian, and by *Quarles, Spence & Quarles,* of counsel; and the cause was argued orally by *Thomas M. Kearney* and *Louis Quarles.*

For the respondents there was a brief by *John T. Kelly,* city attorney, and *Benjamin Poss,* special assistant city attorney, and oral argument by *Mr. Poss.*

The following opinion was filed February 16, 1909:

DODGE, J. The statute, upon which the rights of the parties depend, is ch. 378, Laws of 1903, of which the material part of sec. 2 is as follows:

"Whenever taxable real estate shall be subject to mortgage such mortgage [and the indebtedness secured thereby] for the purposes of taxation shall be deemed an interest in such real estate and shall be assessed and taxed as such interest in the assessment district in which such real estate is located, and not otherwise. . . ."

The contention of the respondents, adopted by the circuit court, is that no indebtedness which is secured by a mortgage on lands without the state or by a mortgage on personal property, in addition to a mortgage upon Wisconsin real estate, is included in this provision, and that is the only question presented for our consideration. Of course a statute which is plain and unambiguous and not absurd must be enforced according to its words. It neither requires nor permits construction to conform it to the court's view of a policy which it approves or believes, independently from the words of the act, the legislature intended. *Duluth, S. S. & A. R. Co. v. Douglas Co.* 103 Wis. 75, 79 N. W. 34; *State ex rel. Cook v. Houser,* 122 Wis. 534, 568, 100 N. W. 964. We find ourselves unable to discover any ambiguity in the words of this section, standing alone. The condition upon which the mortgage debt is to be taxed only as an interest in the real estate is plainly declared by the words "whenever taxable real estate shall be subject to a mortgage." The Wisconsin real estate of the Pabst Brewing Company was taxable and was subject to a mortgage. Upon such situation it would seem that nothing results as a duty either for administrative officers or for courts, except to carry into effect the plain legislative command that the debt secured shall be assessed and taxed as an interest in the real estate, and not otherwise, unless the result would be wholly absurd or would be subversive of the obvious purposes of the legislation as disclosed by other portions thereof enacted in context with that above quoted.

The policy of taxing credits and that of viewing the mortgage as an interest in real estate being conceded (*Kingsley v. Merrill,* 122 Wis. 185, 99 N. W. 1044), there is nothing absurd in declaring that every mortgage upon real estate in this state shall be taxed against the mortgagee as an interest in that real estate, to be separated and deducted from the entire or fee title, to the extent that the amount of the mortgage debt does not exceed the value of the land (*Chicago & N. W.*

R. Co. v. State, 128 Wis. 553, 638, 108 N. W. 557), whether the same indebtedness may also be protected by other security or not. The debt is none the less reached for taxation in one case than in the other, and the machinery provided for administration is equally applicable and effective.

Neither are we able to discover anything subversive of the legislative policy disclosed in the legislation of 1903 in applying it to a mortgage on land in this state less than the value of the land, merely because there is other security for the mortgage debt. In viewing this statute the legislative policy must be differentiated from the practical results in the working out of the law. Most laws in their practical application result in surprises to their originators, and none more frequently than taxation laws. The statute in question was so obviously the result of a very elaborate investigation and report by the tax commission, supplemented by a message from the governor, that reference to those documents is a very important aid in discovering the purpose sought. From the tax commission's report of 1901 and more especially 1903 (ch. V, p. 88 *et seq.*), the fact was made apparent that, notwithstanding existing laws intended to subject credits to taxation, in fact that large class of property in this state was in the main untaxed and practically exempt, not because of declared intent in the existing laws, but by reason of the practical working out of the conflict between statutes and natural laws and tendencies. For illustration, it was disclosed in the report of 1903 that in one locality in the state the entire amount of intangibles assessed for taxation was less than $1/100$ of one per cent. of the total assessed value of all the property, and, while this was an extreme case, the percentage for the entire state prior to 1902 had been between one and three per cent., so that, as we have said, the great mass of credits owned by citizens of Wisconsin enjoyed practical exemption, and credits owned by nonresidents of the state complete exemption, although the latter creditors, many

of them, enjoyed security for such credits under mortgages upon Wisconsin real estate protected by our laws. The tax commission, too, pointed out to the legislature the futility of efforts to render the old method of taxation of credits in any material degree effective, as confirmed by experience in various jurisdictions. The report, amongst various others, presents the suggestions that of these credits which were then practically nontaxable, a considerable proportion were secured by mortgages on real estate, spread upon the public records of Wisconsin and therefore easy of discovery, and that these at least could be reached and made a basis for the taxation of the creditor, at least so far as the law could control contract relations or incidence of such tax. The governor in his message of that year (pp. 20, 21, Senate Journal) took up that phase of the subject and recommended that, since a half loaf was better than no bread, the legislature ought to reach creditors both within and without the state who, by recording mortgages here, had placed themselves within the ken and reach of taxing officers, and ch. 378 was enacted in deference to that recommendation. It nowhere in words discloses any purpose of exemption from taxation, but a purpose to reach for taxation a class of property which theretofore had largely escaped. It provided means which were intended to be, and but for the neglect of officials or contracts between parties would have been, efficient to compel such creditors to pay taxes on the value of such of their credits, at least in the first instance, for it authorized a sale of their mortgage security unless they did so, and authorized the debtor, in protection of his interest, to pay the tax on the mortgage interest and offset it against his debt; besides which, such tax could be collected from the creditor personally. *Allen v. Allen,* 114 Wis. 615, 626, 91 N. W. 218.

Thus was evinced very clearly a purpose to cast the primary burden of taxation upon the holders of such credits, whether they were residents within Wisconsin or outside of

it. That the practical working of the law has not confirmed its efficacy for the purposes intended is, as we have said, not surprising. In the first place, many lenders immediately took precaution to require of a debtor, as a condition of the making or continuance of a loan, that he agree to pay whatever taxes might fall upon the mortgage interest. In addition, a very large volume of the mortgages of the state were written upon blanks which required the mortgagor to pay all taxes upon the land, an ambiguous phrase which, however, the public seem to have construed as requiring him to pay all taxes on both interests. There were, however, a large number of mortgages in the state which contained no such provisions. Under the first two the mortgagors derived no benefit from a separate assessment on the mortgage interest and the fee, and the taxing officers, neglectful of the plain duty imposed by ch. 378, seemed to have adopted a practice to make no severance of the interests for purposes of assessment unless demanded, although there were, and doubtless are, many mortgages containing no agreement that the mortgagor pay the tax. Such conduct is of course in contradiction of the provision of sec. 3 that they might forego such severance only at the expressed option of the mortgagor. Thus has arisen whatever there is of exemption of debts secured by mortgages in this state. Had the assessors uniformly performed their duty to separately assess against all mortgagees the value of their interest in the land, a very considerable amount of such credits would have been found within the reach of the tax levy, at least until the maturity of the mortgages and the making of new contracts. Viewing the dominant purpose of this law, then, as one to impose a tax primarily upon the creditors, both those within and those outside of the state, there is nothing inconsistent therewith or subversive thereof in the separate assessment of every mortgage upon real estate in Wisconsin, and no reason for varying such course because the mortgage debt is protected by other

security. On the other hand, much of that important and dominant purpose would be defeated or obstructed upon a construction which limited the application of the law to a debt wholly secured by mortgage on Wisconsin real estate. It would offer to the parties an easy opportunity to evade such purpose by taking some slight additional security in the form of chattel mortgage, or mortgage upon land in another state, or even by pledge of collateral security, and thus enable the creditor, domestic or foreign, to assert inability of assessors to tax his credits because he held some security therefor other than the recorded mortgage upon Wisconsin lands, and also enable the debtor to claim right to offset such debt against any taxable credits owned by him, in evasion of the obvious purpose of sec. 6 of the act of 1903 (Laws of 1903, ch. 378), amending clause 2 of sec. 1056, Stats. (1898).

Counsel urge upon our attention *Brooks v. West Springfield,* 193 Mass. 190, 79 N. E. 337, where it was held that a mortgage, both upon Massachusetts and foreign real estate and personal property, excluded the debt from their statute providing for its assessment as part of the real estate. The facts in that case differed in that the mortgage debt largely exceeded the value of the Massachusetts land; but, apart from that distinction, we cannot consider that decision authority upon our peculiar statute, even if our reason were convinced as to its correctness under that of Massachusetts. Our statute requires the separate assessment of the mortgage "whenever taxable real estate is subject thereto." The Massachusetts statute exempted the debt "when it was secured by a mortgage on Massachusetts land." By a somewhat refined and technical construction it is possible to hold that a debt is not secured by a mortgage on specified land when in fact it enjoys other security, while no refinement can exclude such a situation from the condition of our statute, namely, "whenever the land shall be subject to the mortgage." Another

citation of respondents is *Newark v. Merchants' Ins. Co.* 55 N. J. Law, 145, 146, 26 Atl. 137, which excluded from an exemption a debt secured by mortgage on both real and personal property; but that case dealt with a statute so variant from ours as to hardly warrant comparison and to make its reason inapplicable here.

It is suggested by respondents that sec. 9 of the same statute, by its final clause, excludes a mortgage which contains any property not subject to direct taxation, but we cannot discover any such meaning in that section. It is directed to the exception from the law, generally, of mortgages upon property taxable by license fee or the like, such as that of railroads, and the final clause, which declares that the act applies only to mortgages upon "property subject to direct assessment and taxation under the general assessment and tax laws," is obviously in mere definition of the antithesis to those which are excluded. Besides, the mortgage in question is upon property subject to direct assessment and taxation none the less because it may cover some other property, at least to the extent that the value of indebtedness is within the value of the real estate subject to such direct taxation.

Finding no reasons sufficient to warrant us in disregarding the plain words of the statute, no course is open except to give it effect according to those words, and to hold that the mortgage in question and the debt thereby secured is assessable and taxable as an interest in the real estate in Wisconsin subject thereto "and not otherwise." Hence that the act of the board of review in assessing that debt, or any part of it, as personal property was unauthorized by law.

By the Court.—Judgment in each case is reversed, and cause remanded with directions to enter judgments reversing the action of the board of review as demanded in the petitions.

A motion for a rehearing was denied April 20, 1909.

LOEWENBACH, Respondent, vs. CITY OF MILWAUKEE and another, imp., Appellants.

January 29—April 20, 1909.

Municipal corporations: Special assessments: Street improvements: Milwaukee charter construed: "Paving" includes repaving: Property assessable: Arbitrary assessment.

1. Under sec. 2, ch. 7, of the charter of Milwaukee, as amended by sec. 6, ch. 310, Laws of 1893 (sec. 959—35, Stats. 1898), and sec. 6 of said ch. 7, if the board of public works and the city council proceed regularly in the manner prescribed they have authority to order a street paved or repaved without a petition from the owners of the abutting property, and have the right to assess the cost thereof (within the prescribed limit of $3 per square yard for both original and subsequent construction) against such property to the extent of the benefits conferred.
2. The word "paving" in said sec. 6 of ch. 7 of the charter is not restricted in meaning to original construction, but includes repaving.
3. Under said sec. 6 of ch. 7 of the charter (since the enactment of ch. 310, Laws of 1893), after the limit of $3 per square yard has been reached, either for original or subsequent cost of street paving, so that owners of abutting property are no longer liable to special assessment, they may, if the majority so wills, secure a more expensive pavement than the city proposes to construct by defraying the increased cost.
4. Where the east forty-six feet of four lots as platted had been conveyed and assessed as a single parcel of land and constituted a homestead, such portions of the lots constituted for practical purposes a single lot fronting on the east and west street and were properly assessed as such for the paving of that street although only one of the lots as platted abutted thereon.
5. In making an assessment of benefits and damages from a street improvement a board of public works should ascertain what such benefits and damages amount to on each parcel of land, instead of assuming that the benefits are equal to the cost of doing the work.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

This action is brought to set aside a special assessment made to cover the cost of a second paving of a portion of State street in the city of *Milwaukee.* The new pavement constructed was of a permanent character and was laid on a concrete foundation. The expense of the former pavement was paid by the abutting lotowners. The circuit court held that the expense should be paid out of the ward fund, and set the assessment aside because the city council had no authority to order the work done at the expense of the abutting lotowners, in the absence of a petition by residents of said city owning more than one half of the frontage on the portion of the street proposed to be paved. The court further held that the board of public works proceeded in an arbitrary manner in making the assessment, and permanently enjoined the collection of the certificate issued against plaintiff's lot on account thereof. The court found as a matter of fact that the benefits accruing to abutting property were, as to each lot, in excess of the charge made against the same to cover the cost of the work, and that it was necessary to do the work ordered.

For the appellants there was a brief by *John T. Kelly,* city attorney, and *Clinton G. Price,* first assistant city attorney, of counsel, and oral argument by *Mr. Price.*

C. H. Hamilton, for the respondent.

The following opinion was filed February 16, 1909:

BARNES, J. Sec. 2, ch. 7, of the charter of the city of *Milwaukee* provides that the paving of any street shall be chargeable to and payable by the lots fronting upon such street to the amount which such paving shall be adjudged by the board of public works to be a benefit to such lots. This section of the charter further provides that, after a street has been paved in compliance with the order of the proper officers, the expense of renewing, repaving, and keeping the same in repair, and of any other subsequent improvement, shall be paid out of the ward fund of the ward in which the

improvement is made. A former pavement having been placed in the streets at the expense of the abutting owners, the section of the charter referred to, if unmodified by any other provision of law, would preclude the city from charging the cost of repaving against the lots adjacent to and fronting on the improvement.

Sec. 6, ch. 310, Laws of 1893 (sec. 959—35, Stats. 1898), provides, in substance, that no property fronting on any street shall be exempt from any assessment of benefits on account of paving such streets with a permanent pavement having a concrete foundation until the owners of such property shall have paid in the aggregate in assessments for pavements in front thereof $3 per square yard for the part of the street lying between the curb and the center line of the street and directly in front thereof. Where property owners have paid less, the property is made liable for the difference between the amount paid and the $3 per square yard limit.

In *Boyd v. Milwaukee,* 92 Wis. 456, 66 N. W. 603, this court held that the law of 1893 operated as an amendment to the charter of the city of *Milwaukee,* and that the cost of a repavement might be charged against abutting property thereunder, regardless of the fact that a former assessment had been made against such property to defray the cost of a pavement, provided the aggregate amount of the charges on account of such paving did not exceed the aforesaid limit of $3 per square yard, and provided, further, that the assessment did not exceed the benefits.

The substantial question in dispute between the parties is very narrow in its limits. It is contended by the respondent that there is no authority conferred upon the city to make the assessment in controversy in the absence of a petition signed by residents of the city and owning to exceed one half the frontage on the portion of the street intended to be improved. It is conceded that no such petition was presented. The appellants urge that the city council had the power to order the

improvement made at the expense of the abutting property owners upon the initiative of the board of public works and without petition. The law governing the mode of procedure is sec. 6, ch. 7, of the city charter. It provides that, whenever the board of public works deems it necessary to grade or otherwise improve any street, it shall make an estimate of the cost of the proposed improvement and place it on file for inspection. The board must make such recommendation in reference thereto as it deems proper, and, upon its report being adopted by the common council, it may order the work done. No work chargeable to lots fronting on the same, "except the . . . paving of streets . . . shall be ordered . . . unless a petition therefor shall be presented to the common council, signed by residents of said city owning a majority of the feet in front of all the lots fronting upon such proposed improvements. . . . The common council may order the . . . paving of streets . . . without such petition." The law then prescribes the method to be followed in the event of the city proceeding to make the improvement without petition.

Under sec. 2, ch. 7, of the charter, as amended by the law of 1893, the cost of paving and of repaving is chargeable against the abutting property until the limit of $3 per square yard is reached. Sec. 6, ch. 7, of the charter expressly authorizes the board of public works, in conjunction with the city council, to pave a street without a petition, provided the proceedings in reference thereto are carried on in the manner prescribed. These two sections must be read together in construing the law and in determining the rights of the parties. There can be little doubt that, if the board of public works and the city council proceeded regularly, they have authority to order a street paved without a petition from the property owners, and have the right to assess the cost thereof, within the prescribed limit, to the extent of the benefits conferred, against abutting property. It is argued, however, that there

is an essential difference between "paving" and "repaving," and that, while the city may proceed against the lotowners without petition to defray the cost of an original pavement, it may not do so as to subsequent construction. This we apprehend to be the real question at issue between the parties, although it is not very clearly elaborated in the briefs filed.

In its ordinary sense the word "paving" is just as applicable to a second or a third construction as it is to the first one. Whenever a new pavement is laid on a street there is a "paving" of such street regardless of whether it has been paved before; and unless there is some clear differentiation between the use of the word "paving" and the word "repaving," as found in the charter, there is little warrant for restricting the meaning of the former word to original construction. Under a law authorizing the city of Philadelphia to order paving done at the expense of the adjacent property owners it was held that such law implied a power to repair and repave at their expense when the condition of the street required it. *Wistar v. Philadelphia,* 80 Pa. St. 505, 511. We fail to find any language in sec. 6 that would warrant the court in holding that the word "paving," as used therein, should have the restricted meaning which it would be necessary to give it in order to uphold the contention of respondent's counsel. In the instant case a substantial brick pavement was laid on a concrete foundation, and it would be more than paradoxical to say that the street was not paved within the meaning of sec. 6 because a block pavement was laid thereon at some prior time.

Said sec. 6 also provides

"that whenever the board of public works shall deem it necessary to pave . . . any street, . . . after the same has been once constructed to the grade established . . . and paved, . . . the expense of repaving whereof, shall be a lawful and proper charge against the funds of the ward, in which such street . . . is situated, and a majority of the residents of said city of *Milwaukee,* owning a majority of the feet in

front of all the lots, fronting on such proposed improvement, owned by residents of such city, shall file a petition with said board, for any pavement . . . deemed by said board to cost more than the estimate made by the board, of the cost of improving said street, . . . it shall be the duty of said board and of the common council to grant the request of such petition, and to proceed to repave . . . said street, . . . according to the prayer of said petition; . . . provided, however, that all cost and expense of such repavement, . . . in excess of the estimated cost of such work, . . . shall be chargeable to, and be made payable by, the lots fronting or abutting upon such street."

Both secs. 2 and 6 were passed prior to the enactment of ch. 310, Laws of 1893, and under them the cost of second or subsequent paving was not chargeable against abutting property. The authority of the city was enlarged, however, by the law of 1893 in the manner before stated. The expense of repaving is chargeable to the abutting property within the limit fixed by that law. The last quoted provision of sec. 6, as the law now stands, means that after the $3 limit has been reached, either in original or subsequent cost of street paving, so that abutting property owners are no longer liable to special assessment, they may, if the majority so wills, secure a more expensive pavement than the city proposes to construct by defraying the increased cost. We conclude on this branch of the case that the court erred in holding that the plaintiff's property was not subject to assessment on account of benefits conferred, it being conceded that the amounts assessed against the property for the former and present pavements did not exceed the limit fixed by ch. 310, Laws of 1893.

The record in the case leaves us much in doubt as to what disposition should be made of it. The findings are prepared, largely at least, with reference to the idea that it was not within the power of the common council to make a special assessment against the abutting property so long as the improvement was not requested by petition. There are some matters of fact found by the court, however, which indicate

that the court believed from the evidence that the assessment of benefits and damages as made was unequal, arbitrary, inequitable, and illegal, assuming that the right to make an assessment existed. To just what extent such findings are predicated on the fact that the assessment was made against a portion of several lots as platted, while but one of them abutted on the improved street, we do not know. The proof showed that the east forty-six feet of lots 14, 15, 16, and 17 had been conveyed and assessed as a single parcel of land and constituted the homestead of the plaintiff. Only lot 17 abutted on State street. We entertain no doubt that the portion of the lots in question, by reason of their subdivision, for practical purposes constituted a single lot fronting on State street and were properly assessed as such. The court also found that the rule pursued by the board of public works in making the assessment of benefits and damages was to estimate the cost of the work and add to such estimated cost an amount sufficiently large to cover any variation in such cost, and that the assessment was made to cover such cost. It was of course incumbent upon the board to ascertain what the benefits and damages amounted to on each parcel of land, instead of assuming that the benefits were equal to the cost of doing the work. Furthermore, the court found that the board did not make its assessment within view of the premises, but made the same at its office eight days later, and that it was physically impossible to make the inspection of about eighty parcels of land from actual view within the twenty-five minutes devoted by the board to physical inspection. The court found as a conclusion of law that, in addition to the assessment of benefits and damages being void because there was no power to make it, it was also void because it was not made "in the manner and according to the rules laid down in the charter of the defendant city, but that the board of public works substituted a rule of its own in making the same." On the other hand, the court, on its own motion,

after the findings in the case were signed, made a supplemental finding to the effect that all of the abutting property affected by the assessment "has been enhanced in value by reason of the making of said improvement from five to ten dollars per front foot, and the property of the plaintiff has been enhanced at least five dollars per front foot." The assessment against plaintiff's property amounted to a little less than $5 per front foot.

The facts found in support of the legal conclusion, that the assessment was unlawfully made, are meager. The appellants in their brief admit that there is evidence in the record to support the finding of the court, but insist that such finding is against the preponderance of the evidence. An examination of the evidence convinces us that there is sufficient testimony to support such findings of fact as are made in reference to the arbitrary character of the assessment. We conclude, on the whole, that the trial court should have stayed proceedings and ordered a reassessment in the action, as provided in sec. 1210*d*, Stats. (1898).

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

A motion for a rehearing was denied April 20, 1909.

MILLER, Plaintiff in error, vs. THE STATE, Defendant in error.

BROMLEY, Plaintiff in error, vs. THE STATE, Defendant in error.

January 30—April 20, 1909.

CRIMINAL LAW AND PRACTICE. (1–5) *Continuance: Absence of witness: Counter affidavits: Denial on conditions: Discretion: Review on appeal.* (6–18, 22) *Instructions to jury: Form and language: Discretion: Presumption of innocence: Self-defense: "Reasonable doubt:" Conviction of lesser offense: Harmless errors.* (19–21, 23, 24) *Evidence: Conspiracy: Declarations: Sufficiency.* (25, 26) *Arrest of judgment: Motion for new trial.*

1. An application for a continuance under Circuit Court Rule XIX may be resisted by counter affidavits as to facts other than the materiality of evidence referred to in the moving affidavit, whether the absent witness will furnish the evidence as claimed, and whether, if he does, it will be truthful.
2. Such an application is addressed to the sound discretion of the court, but it satisfactorily appearing that the desired testimony is material to the moving party's case and that all the essentials of Circuit Court Rule XIX are satisfied even in the light of counter affidavits, in the legitimate field for such proofs,—to deny it would be an abuse of discretion.
3. The decision of a trial court on an application for a continuance, within the field of discretion, is conclusive.
4. In case of an application on the part of an accused, for a continuance in a criminal case, the situation being such that it is within the field of discretion whether to grant or deny the same, the court may take the latter course, conditioned upon the prosecution admitting upon the record that the absent witness would, if produced, testify as claimed, the same to be considered by the jury as if testified to by the witness upon the trial.
5. If upon a criminal trial the accused makes such an application for a continuance on the ground of the absence of a witness, which is not within discretion to deny, it is error to do so on condition that such a concession be made as indicated in the last foregoing paragraph, but it may be done upon condition of the prosecution admitting the truth of the testimony which it is claimed the absent witness would give if present.

6. A trial judge may exercise his own discretion as to the mere language used in expounding principles of law, but where there exists a phrasing of an important rule approved by this court, the better administration is to follow it.
7. Neither the statutes nor the unwritten law prevents a trial judge from incorporating all approved requests to instruct in the general charge, so as to cover every phase of the case properly requested by counsel to be given, without repetition and in logical order.
8. The rule as to the legal presumption of innocence excludes the idea that a mere criminal charge is evidence of guilt, rendering instruction as to the latter unnecessary, if such rule is plainly given.
9. The common-law rule as to duty of one attacked to "retreat to the wall" or so far as he can, or so far that to go further would rather increase than decrease the danger,—the "flight rule,"—is no longer the law.
10. If a person is attacked by another, without that other's fault, and such person has reasonable ground to apprehend he is in imminent danger of losing his life or receiving some bodily injury at the hands of such other, he is justified in acting upon such reasonable apprehension, regardless of the real facts, doing whatever to him at the time seems reasonably necessary for his efficient protection, even to taking the life of his adversary.
11. In a prosecution for an alleged criminal homicide, a wrong instruction on the subject of self-defense does not constitute error, harmful to the accused, if in no reasonable view of the evidence could the claimed right to slay in self-defense be sustained.
12. Refusals to instruct on the subject of reasonable doubt, whether of an explanatory nature or not, do not constitute error, if the subject is covered by a proper statement of the rule in the general charge.
13. It is proper to instruct a jury that, if they believe from the evidence beyond a reasonable doubt that the accused is guilty of some offense of criminal homicide within the charge made against him but entertain a reasonable doubt as between a lower and higher degree, they should convict of the lower, rather than of the higher, if satisfied beyond a reasonable doubt from the evidence that he is guilty at least of such lower.
14. Where an instruction is so involved that it did not, in any reasonable probability, impress the minds of the jury with any idea in the case one way or the other, it may be regarded as harmless error.
15. If a witness testifies wilfully falsely as to any material matter in the trial of a case, the jury may, if it sees fit, but is not

bound to, reject all of such witness's evidence not corroborated by some other credible evidence.

16. If one has a doubt which would cause an ordinarily prudent man to pause and hesitate to act in the most important affairs of life, he has a "reasonable doubt" within the meaning of that term, as used in the law.

17. Guilt is proven beyond a reasonable doubt when all the evidence in the case, clearly, impartially, and reasonably considered, is sufficient to impress the judgment of ordinary reasonable and prudent men with a conviction upon which they would act, without hesitation, in the most important affairs of life.

18. If a person is assaulted on another's premises by the latter and a serious affray results, terminating in the party assaulted leaving such premises, being commanded to do so and not to return, such occurrence does not militate against such other's right of self-defense, in case of such person returning and, without justification by the conduct of such other, creating in the mind of such other reasonable apprehension of being presently killed or receiving some serious bodily injury.

19. In case of the commission of an offense by two or more persons concerting together to that end by prearrangement, a declaration of one after the fact of an incriminating character, is not admissible as evidence against the other, or others, but such a declaration after the formed, and before the consummation of the, purpose, may be so received.

20. If on the trial of a criminal action it is claimed the offense was committed in consummation of a conspiracy, an incriminating declaration of one member of the conspiracy is not admissible against the other, unless evidence is produced sufficient, in the judgment of the court, to warrant the jury in finding the existence of the conspiracy beyond a reasonable doubt.

21. Where the common design to commit a criminal offense is at an end, whether by accomplishment or abandonment, no one of the conspirators is permitted, by any subsequent act or declaration of his own, to affect the others.

22. A suggestion in the charge to a jury in a criminal case of the existence of a phase of the case prejudicial to the accused, which is not warranted by the evidence, is harmful error.

23. Where two persons are charged with being guilty of having committed an offense of criminal homicide of the first magnitude, and the claim of the prosecution is that they acted to that end and pursuant to agreement, and there is evidence tending to establish that situation, yet there is room in the evidence for believing, reasonably, that one of the parties did not participate in the design to kill or in anything more than to punish,

the guilt of the other of the highest offense does not require that one to be so convicted or acquitted.

24. Where upon review of the conviction of a person for a criminal offense, it appears that there was no evidence, in any reasonable view of it, warranting the belief of guilt to a moral certainty, and there was a motion to discharge on that ground, the judgment should be reversed and the cause remanded with directions to grant the motion.

25. The common-law motion in arrest of judgment in a criminal case, with the ancient practice and technicalities in respect thereto, does not exist under the Code. That as to practice covers the subject of criminal as well as of civil trials.

26. A motion, after conviction, to discharge for any ground good at common law in support of a motion in arrest of judgment, or to stay the entry of the judgment for any legitimate cause, may be called a motion in arrest of judgment, but it does not, necessarily, waive the right to move for a new trial, and in case of both motions being made, the order thereof or the deciding of the same is immaterial, so long as the decision on the motion for a new trial precedes the entry of judgment.

[Syllabus by MARSHALL, J.]

ERROR to review a judgment of the circuit court for Taylor county: JOHN K. PARISH, Circuit Judge. *Affirmed as to plaintiff in error Bromley; reversed as to plaintiff in error Miller.*

The plaintiffs in error were, in due form, charged with the offense of murder in the first degree, in that they, on the 18th day of March, 1906, at the town of McKinley in Taylor county, this state, feloniously assaulted Thomas McGowan with premeditated design to take his life and by such assault effected such design. Such proceedings were in due form had that they were found guilty by the verdict of a jury, and subsequently were in form sentenced as the law seemed to require. The facts as aforesaid are stated in the opinion.

W. H. Stafford, for the plaintiff in error *Bromley.*

John B. Hagerty, for the plaintiff in error *Miller.*

For the defendant in error there was a brief by the *Attorney General* and *A. C. Titus,* assistant attorney general, and *R. Sleight,* of counsel, and oral argument by *Mr. Sleight.*

The following opinion was filed February 16, 1909:

MARSHALL, J. These matters were undisputed upon the evidence, or substantially so: In the evening of March 18, 1906, Thomas McGowan, accompanied by several other persons, laborers in a logging camp, in the vicinity of the home of the plaintiff in error *Stephen Bromley,* for whom plaintiff in error *Belle Miller* was housekeeper, visited *Bromley's* house. *Bromley,* in addition to working at times in the woods, conducted a small farm, and kept liquor, cigars, and tobacco for sale. He knew of McGowan and regarded him as an undesirable fellow to have at his place. *Belle Miller* had seen him on another occasion when he visited the house and ill-treated her. She was a person of some considerable intelligence, but a woman of low degree; of questionable character, at least. *Bromley* had heard that McGowan purposed coming to his place to clean out his house and do him personal harm. When he made his appearance, *Bromley* anticipated trouble and requested one or two persons to stand by him in the event thereof. There were two visitors present other than McGowan and those who accompanied him. He and his party were somewhat under the influence of liquor when they arrived. Drinks and cigars were soon called for and there was a season of hilarity lasting some little time. One of the men went into a side room with *Belle Miller* and after staying a short time returned. McGowan then went into such room with the woman and after some whispered conversation she came out. He beckoned her to return but she refused, and accused him of being Thomas McGowan, which he denied. She persisted in her accusation, saying his face could not fool her. Later she proposed a toast of an immoral character and insinuatingly insulting to McGowan. There was further drinking, resulting in disputes between McGowan and *Bromley* and the former throwing off his coat and attacking the latter. At about this time, *Belle Miller* struck McGowan with

a bottle and one of his associates retaliated by striking her or pushing her away. Quite an affray took place in which these three principals took part, as also did some of the others. In the main, however, it was confined to McGowan, *Bromley,* and *Belle Miller.* No one was seriously injured except the woman. She was considerably bruised, particularly about the head, her nose being broken, several teeth loosened, and her lip cut. Her right hand was also badly injured. About the commencement of the affray, or during its progress, *Bromley* ordered McGowan and his associates from the house, but they showed no disposition to obey till firearms were brought into use by *Bromley.* After the affray had continued for a brief space of time, *Bromley* obtained from the room north of the one the company were in a double-barrel shotgun and approached McGowan with it in a menacing manner. In the meantime some of the party had gone outside. *Bromley* raised the gun as if to shoot McGowan and about that time a missile was thrown through the window by one of the party who had left the room. It broke the window and was aimed at *Bromley* or the gun. McGowan took hold of the gun as *Bromley,* apparently, was attempting to use it on him. While the two were contending in this situation, *Bromley* discharged both barrels of the gun, but did not injure any one. Immediately, or shortly thereafter, *Bromley* possessed himself of his rifle from the adjacent room, by which time, or immediately thereafter, McGowan and the last of the party and all but *Belle Miller* had fled to outdoors. All but these three, McGowan, Reiman, and Hartman, except one who had gone home immediately after the shooting, went away from the house up the road to the north 100 feet or thereabouts. The three for a time were out of sight from the door. As McGowan and Reiman went around the corner of the house they met Hartman. McGowan requested the two others to return and procure his hat and coat. The three then returned toward the door, McGowan leading. In the meantime *Brom-*

ley had stepped out of the house and stood in front of the door. Whether he had his rifle in his hand as he stepped out, or it was handed to him while he stood at the door or in front thereof, was not observed by the three men who were approaching. It was a pretty cold moonlight night, though not light enough to enable one to make out the countenance of another at the distance away the men were. If there was a light in the house it did not cast its rays through the open door efficiently, if at all. As soon as *Bromley* observed McGowan approaching, or about that time, the latter, or some one of the other men, asked for the coat and hat. *Bromley* replied by ordering them away. McGowan was then within some twelve feet of *Bromley*. What further occurred between them took place very quickly and is in dispute. Neither McGowan nor any of his party were armed. *Bromley* knew that from the facts that he had not seen any appearance of weapons, or heard any threats to use any, though he pretended on the trial to have apprehended they might have firearms. After the request for the hat and coat and before McGowan had time to, or did in fact, move any considerable extent toward *Bromley* from where he first observed him, he, *Bromley,* suddenly presented his rifle and fired, killing McGowan instantly. The bullet struck McGowan slightly below the right nipple and coursed diagonally, but nearly on a plane with the surface of the ground, to a point just under the skin two inches to the left of the center of the spine. He had numerous slight wounds on his body and some powder marks. *Bromley* was skilled in the use of the rifle. It was a 30–30, magazine Winchester, carrying, at full load, nine charges, and was usually kept ready for use to its capacity.

There was some evidence on the part of the accused, given by *Bromley,* tending to prove that *Belle Miller* did not get either of the guns for him, or request him to shoot or know anything about his purpose when he stepped outside the door with the rifle, at least other than that he proposed acting

strictly on the defensive of his person and habitation; that he stepped outside to drive off some of the men who were breaking windows and menacing his safety; that when he commanded McGowan not to approach he added "Or I will shoot;" that McGowan replied he was coming inside, and continued to approach, and then, apprehensive of losing his life or receiving serious bodily injury if he did not act quickly, he fired the fatal shot. There was evidence on the part of the state, as was supposed, tending to show that *Belle Miller,* on both occasions, procured the gun for *Bromley;* that when he stood in front of the door and observed some one approaching he demanded to know who it was, and exclaimed, "Get out!" that the reply was a request for the hat, to which *Bromley* answered back, "You are McGowan," and without previously exhibiting the rifle so it was observed, or threatening to shoot and giving time for McGowan to retreat, he fired.

On an application for a continuance on behalf of the accused upon affidavit in compliance, as to form, with Rule XIX of Circuit Court Rules and covering in substance the essentials therein prescribed, the court decided that it was proper to consider counter affidavits respecting whether proper diligence had been used to secure the attendance of the witness whose testimony was desired, but not the materiality of his evidence or its truthfulness, and such counter affidavits were received accordingly, and were considered in reaching a conclusion in favor of the prosecution.

There is no statute in this state governing the matter of whether counter affidavits are proper or not and no settled judicial policy in respect to the matter found in the adjudications of this court. Neither is there any definite universal rule deducible from the decisions elsewhere. In some jurisdictions it is held that on an affidavit for a continuance in strict compliance with the statute, the court is bound to grant it and cannot exercise any measure of discretion; that counter affidavits cannot be used at all. *Chicago P. S. Exch. v. Mc-*

Claughry, 148 Ill. 372, 36 N. E. 88; *Gandy v. State,* 27 Neb. 707, 43 N. W. 747, 44 N. W. 108; *Barton v. McKay,* 36 Neb. 632, 54 N. W. 968; *Cutler v. State,* 42 Ind. 244; *Eslinger v. East,* 100 Ind. 434, are good illustrations, to which many more might be added.

In quite as many, if not more, jurisdictions, it is held that there is no arbitrary rule on the subject; that the application is addressed to the sound discretion of the court in the broadest sense; that counter affidavits may be received as to facts other than the materiality of the evidence, its truthfulness, and whether the witness will give the evidence or not, and that the court's discretion will not be disturbed on appeal except for a very clear abuse of its discretionary authority. See *George, Weeks & Co. v. Swafford Bros.* 75 Iowa, 491, 39 N. W. 804; *State v. Murdy,* 81 Iowa, 603, 47 N. W. 867; *State v. McCoy,* 111 Mo. 517, 20 S. W. 240, as to impeaching the claim of diligence; *Cushenberry v. McMurray,* 27 Kan. 328; *Lascelles v. State,* 90 Ga. 347, 375, 16 S. E. 945, as to want of good faith; *Hyde v. State,* 16 Tex. 445, as to improbability of the witness being obtainable at all or within any reasonable time; *State v. Murdy,* 81 Iowa, 603, 47 N. W. 867, as to inability to procure the witness because of his being sick; and *State v. Bailey,* 94 Mo. 311, 7 S. W. 425, as to necessity for postponement because of sickness of counsel. And many other illustrations of that nature are at hand.

In some jurisdictions, use of counter affidavits in respect to such matters is regarded as a matter of right, while in others it is held that they may be used or not in the sound discretion of the court. *State v. Dettmer,* 124 Mo. 426, 27 S. W. 1117.

An understanding of the numerous adjudications in the vast field covered by them requires a careful comparison thereof with statutory regulation and court rules. In some jurisdictions there are definite written rules or laws governing the subject to which the adjudications are referred, as if a more severe rule, one way or the other, would prevail were

the matter left to unwritten law. In some jurisdictions holdings may be found on every phase of the subject, referable to judicial law solely.

The foregoing brief review is sufficient to show the utter impracticability of obtaining any certain guide from decided cases, so we may well take our bearings from the broad, liberal scheme of our Code and such incidental holdings as are found in our own cases.

The dominant principle of our Code is that justice shall be administered with little regard to technicalities, and even errors which do not, appreciably, prejudice the rights of the parties (sec. 2829, Stats. 1898); that to such end trial judges should exercise broad discretionary authority respecting many matters not regulated otherwise, definitely, by the written law, affording the parties the fullest opportunity by the simplest methods practicable in the judgment of the judicial administrator, the practice by one not being more than advisory as regards another,—for vindicating their rights, consistent with reasonable, economical, speedy, and certain attainment of justice; the initial decision in this broad field of discretion to be the infallible rule for the particular case or proceeding, unless so manifestly contrary to any fair standard of human judgment as not to be sustained in any reasonable view.

So this court has adopted the rule that an application for a continuance, with such limitations as are contained in the circuit court rules, is addressed to the sound discretion of the trial court. *Gear v. Shaw,* 1 Pin. 608; *Hayes v. Frey,* 54 Wis. 503, 11 N. W. 695; *McMahon v. Snyder,* 117 Wis. 463, 94 N. W. 351.

True, when an application for continuance is based on an affidavit making the showing required by Rule XIX and fully satisfying the essentials thereof, which it may or may not do according as it shall be opposed by counter proofs so far as permissible, it should be granted as a matter of right.

Gonring v. C., M. & St. P. R. Co. 78 Wis. 16, 47 N. W. 18. But that is because to deny it would be a manifest abuse of discretion. However, whether the showing contained in the affidavit sufficiently establishes the facts required, particularly as to the use of diligence to prepare for trial, and shows some reasonable probability that a continuance will enable the applicant to procure the attendance of the absent witness within some reasonable time, are within the field of sound judgment.

It is not true that, merely because the applicant states he has used due diligence to prepare for the trial and states the facts in that regard, such facts are, necessarily, to be taken as establishing the essentials of due diligence. That is left within the field of discretion to decide. Nor is it true, if all of the essentials mentioned in the rule are satisfied in the judgment of the trial judge, that a continuance must be granted merely because the applicant cannot safely proceed to trial without presence of the absent witness. If it were, cases would arise which could never be pressed to trial. So then there must appear some reasonable probability, at least, that the absent witness, or testimony, can be procured in case of the continuance being granted.

In view of the foregoing, on principle, in vindication of our system indicated, it seems that, as to matters within the discretionary field, and all matters aside from the materiality of the testimony, and whether the absent witness will testify as claimed, and whether, if so, his evidence will be true, counter affidavits may be permitted,—in some instances ought to be; that such practice is essential to the due administration of justice. That harmonizes with the ruling of the circuit judge, made with full appreciation that he was dealing with an open question, in the main, as regards practice in this state.

The conclusion thus reached is not out of harmony with *Davis & R. B. & Mfg. Co. v. Riverside B. & C. Co.* 84 Wis.

262, 54 N. W. 506, while it has some support in *Schamper v. Ullrich,* 131 Wis. 524, 111 N. W. 691.

The better rule, if not the weight of authority elsewhere, supports the foregoing, and on that we cite the following additional authorities: *Johnson v. State,* 65 Ga. 94; *Brown v. State,* 65 Ga. 332; *Matthews v. Bates, K. & Co.* 93 Ga. 317, 20 S. E. 320; *Salisbury v. Comm.* 79 Ky. 425; *Riggs v. Fenton,* 3 Mo. 28; *State v. Murdy,* 81 Iowa, 603, 47 N. W. 867; *St. Louis & S. F. R. Co. v. Woolum,* 84 Tex. 570, 19 S. W. 782; *Walt v. Walsh,* 10 Heisk. 314; *Dimmey v. W. & E. G. R. Co.* 27 W. Va. 32; *People v. DeLacey,* 28 Cal. 589; *Allen v. Reilly,* 15 Nev. 452.

The circuit court, in view of the counter proofs within the limitation above indicated, and supplemental proof, which the accused were allowed the amplest opportunity to present, held that such diligence was not shown as to entitle them to a continuance; yet with abundance of caution, regarding the application to be within judicial discretion to grant or deny, refused to compel the accused to go to trial, except upon condition of the prosecution consenting to admit upon the record that the absent witness, if present, would testify as claimed in the application, the testimony so brought into the trial to be weighed by the jury the same as if given in court in the ordinary way and to be likewise subject to be discredited by other testimony. That was done, the prosecution submitting to the condition and the accused taking advantage of it, protesting, however, that they were entitled to the continuance on the affidavit presented therefor, and on the whole case as well, and that it was erroneous to supersede that right by the concession exacted or to give such concession weight in the exercise of discretion.

Some of the questions thus raised might be passed without deciding them, since the court is of the opinion that there was no clear abuse of discretion in holding that the accused were not entitled to a continuance on the case made therefor.

Notwithstanding such decision, it was doubtless competent to grant the continuance, so the question is presented whether, in case the way is open in a criminal prosecution to either deny or grant a continuance on application of the accused, it is harmful error, or error at all, to incline to the side of the prosecution on condition, as in this case.

The affirmative of the foregoing would seem too evident to require discussion.

True, in face of the constitutional rights secured to accused persons by written constitutions generally, to compel the attendance of witnesses in their behalf and to have them orally examined upon the trial, there are holdings that a law or a judicial rule requiring them to take, in lieu thereof, a concession from the prosecution, as in this case, is a violation of a fundamental privilege. *People v. Diaz,* 6 Cal. 248; *Graham v. State,* 50 Ark. 161, 167, 6 S. W. 721; *Newton v. State,* 21 Fla. 53, 70; *State v. Loe,* 98 Mo. 609, 12 S. W. 254; *State v. Dyke,* 96 Mo. 298, 9 S. W. 925; *People v. Fong Chung,* 5 Cal. App. 587, 91 Pac. 105. We venture to say in passing that such instances are very few as compared with those to the contrary. *Territory v. Guthrie,* 2 Idaho, 432, 17 Pac. 39; *State v. Felter,* 25 Iowa, 67, 73; *State v. Shannehan,* 22 Iowa, 435; *State v. Bartley,* 48 Kan. 421, 29 Pac. 701; *State v. Lund,* 49 Kan. 580, 31 Pac. 146; *Territory v. Harding,* 6 Mont. 323, 12 Pac. 750; *McNeally v. State,* 5 Wyo. 59, 36 Pac. 824; *Comerford v. State,* 23 Ohio St. 599; *DeArman v. State,* 77 Ala. 10; *Dean v. State,* 89 Ala. 46, 8 South. 38; *Comm. v. Donovan,* 99 Mass. 425; *Carmon v. State,* 18 Ind. 450. Some courts have gone so far as to hold that even an admission of the truth of the alleged testimony cannot deprive an accused of his constitutional privilege. *Goodman v. State,* Meigs (Tenn.) 195. Some courts have held one way on the main question and later held another, notably that of Missouri and that of Arkansas.

Passing the question of constitutional right, there are

many authorities holding that it is an abuse of discretion to force an accused person to trial in the absence of a witness whose testimony he desires, and in face of an adequate showing for a continuance, without a full concession upon the record of the truth of the facts to which it is alleged such witness will testify. A long line of cases so holding will be found in 4 Ency. Pl. & Pr. 886. We may well note that they are mostly quite ancient, while the authorities holding to the contrary are quite recent. However, we must confess that the text-writers, as a rule, seem to regard the weight of authority and the better rule to be that way. This court subscribes to that rule, especially in view of constitutional rights. My personal view is that, upon a full concession being made, as in this case, even in the event of a good case made for a continuance, it not only is within the discretion but the discretion ought to be exercised, to proceed with the trial under some circumstances. That the constitutional right to have one's witnesses, in case of a criminal prosecution against him, testify upon the trial, does not mean under all circumstances. Otherwise, the wheels of justice might be impeded, to great public detriment, without really subserving any private right except in a technical sense. In case of great prejudice to public interests by delay, and the accused having had, without success, the amplest use of all legal instrumentalities to compel attendance of his witness, and it appearing that further postponement will furnish only a bare possibility, or a remote probability, of better success, the court should not only have the power to proceed with the trial upon a concession being made, as here, but it might be its duty to the public to do so and a favor, instead of a prejudice, to the accused; certainly not a violation of any constitutional right reasonably administered. It is the opinion of the court that in case of the presentation for a continuance being so weak that the trial court might decide either way, then, in its discretion, it may grant or deny the application, according to whether the

adverse party will make a concession such as was exacted here.

The learned court prefaced instructions to the jury, requested by counsel for the accused, by this:

"Under the law of this state, it is the duty of the trial judge to submit all questions of law prepared by counsel in the language of counsel, or refuse the same. The supreme court of this state have also said that a charge should never be more than three pages in length. I find myself 'between the Devil and the deep sea,' with all respect to the legislature of the state and the supreme court, as the instructions asked for by counsel for defendants, although I have attempted to prevent any repetition, far exceed the limit prescribed by the supreme court. I will now read you the instructions asked for by the defendants' counsel."

After concluding the reading of such requests as were approved, the court called special attention to the fact that they were in the language of counsel, specifying the same by name, and admonished the jury, "I will now charge you in my own language," following it by giving instructions covering seventeen full typewritten pages.

Counsel for the accused seriously complain of the proceeding indicated, and well they may. Such expressions as were indulged in, rather tend to lower the standard of judicial administration from its proper high level. The learned judge, doubtless, meant no disrespect either to this court or the legislature, or the counsel for the accused, and certainly not to his own high office. Nevertheless, we feel it our duty to say, the attitude displayed was poorly calculated to properly impress the jury with the serious duty waiting to be discharged, and to impress them, efficiently, with the legal principles governing the case. A jury on such an occasion, one involving the liberty of an accused person for all time, so far as he is concerned, should be imbued with the highest respect for the law. An important factor to that end is respect for the superior authority which says, and must say for all, what is and what is

not the law. That respect breeds respect for the visible administration of the law and the trial court, to which the jury must look as their tutor. The system must be held up from the fountain head down to, and including, the smallest instrumentalities in the judicial administration. In that way only can the jury be reached and lifted to a high plane and inspired to do their best work in a case like the one in hand.

This is not said in any spirit of harsh criticism of the painstaking judge who presided at the trial. We regard the language that was used as mere passing remarks, not intended to have the effect counsel ascribe to them, yet we are not prepared to say they were not likely to create an unfavorable impression derogatory to counsel and the defense and the administration of the law by superior authority, as suggested. It were better, opportunity for the complaint had not been furnished. Nevertheless, on a survey of the whole situation, we are unable to reach the opinion that the interests, at least of the dominant figure in the case, as it must terminate as hereafter indicated, were in any probability, efficiently prejudiced.

The remarks as to the origin of the requests were not by themselves prejudicial, though it is considered the better practice in giving requests is, to simply give them without mentioning the source of the initiation. All instructions to a jury are supposed to emanate from the court. The requests are mere suggestions to move the judicial mind. There should be no varying degrees of dignity in rules laid down as to whether original with the court or suggested by counsel. Each is the peer of the other. So, to the end that partisanship should neither be an advantage or disadvantage as to the request that may be made, it is the better practice for the approved requests to be either incorporated into the general charge or be given, strictly, as law from the court.

A judge in charging a jury may exercise his own discretion as to how he shall expound rules of law, though, as has often been said, the approved expressions of important principles

by this court, ought to be followed, especially when special attention is called to them by counsel. Whether they are the best or not, they are the safest. To give a rule, as so phrased, at the request of counsel, and then attempt to give the same rule by an original phrasing, quite different in words and as it is liable to be understood by a layman, especially in case of the former being treated with disfavor, may well be avoided. In the judgment of the writer the better practice is one which is permissible by a long line of our decisions, that is, to incorporate all approved requests into the general charge. That gives opportunity to easily avoid repetition and present all the legal principles applicable to a given situation in that logical order, best calculated to inculcate them, efficiently, upon the minds of the jurors.

The rule that "counsel must formulate in writing the exact words of the instruction he desires given" (*Schroeder v. Wis. Cent. R. Co.* 117 Wis. 33, 42, 93 N. W. 837), and that the principles of law must be given without variation or not at all, does not require an instruction to be given in the precise language used by counsel, or even separately from the general charge, if included therein. This court has given trial courts great latitude in that regard. *Suckow v. State,* 122 Wis. 156, 163, 99 N. W. 440; *Murphy v. State,* 124 Wis. 635, 655, 102 N. W. 1087; *Hughes v. C., St. P., M. & O. R. Co.* 126 Wis. 525, 535, 106 N. W. 526; *Winchel v. Goodyear,* 126 Wis. 271, 278, 105 N. W. 824; *Hayes v. C., M. & St. P. R. Co.* 131 Wis. 399, 407, 111 N. W. 471.

Since the expression of the learned circuit judge as to this court having laid down a rule that "a charge should not be more than three pages in length" has been incorporated into this opinion, it seems best to suggest that this court is not aware of having made any such rule or said anything giving rise to any such idea. The learned circuit judge could not have appreciated the force of his words, for, certainly, had he supposed there was any such rule, consciousness of duty to conform thereto would have prevented the presentation of

the seventeen-page charge in this case. The jury might well have taken it that this court had made a rule so absurd as to be only worthy of such a spectacular ridicule as the mention of it, followed by the long charge. A mere passing remark by a judge, perhaps warranted by the particular situation under treatment, as in *Duthie v. Washburn,* 87 Wis. 231, 236, 58 N. W. 380, is neither a rule of court nor a personal suggestion of general application. What is said here is not to be taken as in any sense a criticism of the length of the charge. It was full and not too much so.

Now while the lengthy treatment of counsel's assignment of error seems justified, we are inclined to the opinion that an ordinarily intelligent jury would not be liable to be influenced, materially, by the matter complained of.

The court did not commit error by refusing to give the requests to the effect that a mere charge of guilt is not evidence thereof, and no jury should be influenced by that mere fact. So far as that had any bearing on the case, it was fully covered by the language of the general charge as to the presumption of innocence.

Exceptions were taken both to a refusal to give a requested instruction and instruction given on the subject, of duty to retreat, avoiding necessity to take human life in self-defense, all of which may best be considered together.

The court instructed in these words:

"A person who is assaulted and his life put in danger by the assault, or if he is in danger of receiving great bodily harm from such assault, may take the life of his assailant, but should not do so when he can retreat in safety and thereby save his life or save himself from receiving great bodily harm, without taking the life of his assailant, but if a person is assaulted as aforesaid while in his house he would not be obliged to flee out of his house from such assailant."

Counsel for accused requested this to be given:

"If the defendant *Bromley,* at the time the fatal shot was fired, had reasonable grounds to believe and in good faith be-

lieved that the deceased intended to take his life or to do him great bodily harm, he was not obliged to retreat, but was entitled to stand his ground and meet any attack made upon him or which he had reasonable ground to believe was being made upon him in such a way and with such force as under all the circumstances he at the moment honestly believed and had reasonable grounds to believe was necessary to save his own life or to protect himself from great bodily harm."

The request was modified and given as changed, the new element being expressed thus:

"This rule applies where a person is assaulted within his own house. The state claims that the alleged assault, if made at all, was made out of doors, immediately before the firing of the shot which killed the deceased, Thomas McGowan."

Those instructions, in the whole, were confusing, contradictory, and plainly erroneous. They offend against the long-established law of this state. The ancient doctrine requiring the party assaulted to "retreat to the wall," as it is laid down in Blackstone and the early common-law writers, the "flight" rule requiring such party, with some exceptions including defense within one's dwelling, to flee from the presence of danger as far as practicable in a physical sense, or so far that to go further would tend rather to increase than lessen the apparent danger, may have been all right in the days of chivalry, so called, but, by almost common consent of the moulders of the unwritten law, in later years, it is unadaptable to our modern development and, therefore, has been pretty generally, and in this state very definitely, abandoned. It has been superseded by a doctrine in harmony with the divine right of self-defense; the doctrine that when one is where he has a right to be and does not create the danger by his own wrongful conduct, he may stand his ground, if assailed by another, and in case of his honestly and reasonably believing himself to be in imminent danger of losing his life or receiving some great bodily harm at the hands of such other, he may use such means as, presently to him, reasonably, seem

necessary to avert the impending danger, even to taking the life of his assailant. The supreme court of the United States in *Beard v. U. S.* 158 U. S. 550, 15 Sup. Ct. 962, has laid down the law thus:

"In our opinion, the court below erred in holding that the accused, while on his premises, outside his dwelling house, was under legal duty to get out of the way. . . . The defendant was where he had a right to be, when the deceased advanced upon him in a threatening manner, and with a deadly weapon; and if the accused did not provoke the assault and had reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life or do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such way and with such force as, under the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, was necessary to save his own life or to protect himself from great bodily injury."

It will be seen that the vice of the instruction which the federal court condemned is the very element the trial court, in this case, added to the request presented by counsel. The element of deadly weapon in the hands of the assailant, given some significance in the quoted language, bore only on the question of whether the assaulted had reasonable ground to apprehend the serious danger and necessity for doing as he did to avert it. The gist of the matter is that a person no longer need flee from danger of personal injury at the hand of another rather than strike him down to avert it, if that danger in honest, reasonable apprehension, is of the grade mentioned, and such striking is so apprehended to be necessary, and such danger is not produced by such person's wrong. The reasonable, honest apprehension is the key to the justification. If it turns out that there was no such danger in fact nor any such necessity, the justification, nevertheless, remains unimpaired.

This court fully indorsed what has been said in *Perkins v.*

State, 78 Wis. 551, 47 N. W. 827; *Richards v. State,* 82 Wis. 172, 182, 51 N. W. 652; *Frank v. State,* 94 Wis. 211, 218, 68 N. W. 657; *Ryan v. State,* 115 Wis. 488, 502, 92 N. W. 271; *Holmes v. State,* 124 Wis. 133, 142, 102 N. W. 321; *Schmidt v. State,* 124 Wis. 516, 519, 102 N. W. 1071.

An examination of those cases shows that no responsibility rests upon this court for not explaining, clearly, the law of self-defense, so that trial courts need not go astray. It has been done over and over again. The difficulty seems to be in eradicating the ancient rule, as regards general application, while retaining it as to situations where the danger to be averted is created by wrongful conduct on the part of the person assaulted.

Much difficulty will be avoided by trial courts adhering closely to the doctrine phrased in language which has received repeated approval by this court. It may be found best stated in *Frank v. State, supra,* which we reproduce, substantially, with some transposition of words:

The taking of human life is a matter of such deep significance that it cannot be justified by any slight appearance of danger. If the defendant is in fault in creating the situation of danger, his right of self-defense does not arise until he has done all he honestly reasonably thinks he can do, without killing his assailant, to save his own life or save himself from great bodily harm. But the law does not require a person, in order to make out the defense of justification for killing his adversary, to prove that the apprehension or the necessity to resort to that extremity existed in fact. If he has reasonable ground to apprehend that he is in imminent danger of losing his life or receiving some serious bodily injury at the hands of his assailant, he has a right to act, efficiently, upon such reasonable apprehension and employ, what, to him at the time, honestly, seems necessary to that end, even to taking the life of his assailant.

In this connection we repeat that forms of expressing important rules, approved by this court, should be followed by circuit courts. *Buel v. State,* 104 Wis. 132, 80 N. W. 78; *Pumorlo v. Merrill,* 125 Wis. 102, 114, 103 N. W. 464.

The numerous errors in the learned judge's instructions on the law of self-defense stand out plainly when compared with what has been said. When he instructed "in his own language" he made the essential of danger actual instead of in reasonable apprehension. For the right of the party assaulted to stand his own ground, he substituted, duty to flee. Even in case of one making his defense in his own dwelling house, the danger excusing homicide was made actual instead of danger existing, in honest reasonable apprehension, and necessity to go to the extreme, actual, instead of, existent in such apprehension.

The requested instruction was formulated from the decisions of this court. It was faultless. It should have been given in place of what was given, or similar language should have been used. Given with the addition the court made thereto, it repeated a crowning vice of the court's instruction "in his own language" and was inconsistent with, not corrective of, the other infirmity mentioned. Even a correct instruction following an incorrect one, as if the two might stand together, does not cure the error, as one cannot tell upon which the jury relied. *Schmidt v. State,* 124 Wis. 516, 519, 102 N. W. 1071; *New Home S. M. Co. v. Simon,* 107 Wis. 368, 83 N. W. 649; *Eggett v. Allen,* 106 Wis. 633, 82 N. W. 556. In such cases the error is fatal if from the whole charge under all the circumstances it appears probable that the jury may have been prejudicially misled.

The foregoing leads to the secondary question of whether the erroneous instruction was harmful. Manifestly, if the evidence did not disclose any fair ground for the accused to reasonably, honestly apprehend necessity for him to do as he did, to avert, at least, to him reasonably apprehended danger of his receiving serious bodily injury, or our conclusion is that he did not act upon any such apprehension, then the whole theory of self-defense fails; no instruction in regard to it was necessary and the one given, however errone-

ous, was not harmful. *Anderson v. State,* 133 Wis. 601, 614, 114 N. W. 112.

We have the best light in which the evidence can be viewed in behalf of the accused, by taking that of *Bromley* himself, in connection with physical situations and circumstances established conclusively by the evidence. He had no reasonable ground whatever for believing that McGowan or any of his party were armed. We cannot escape that conclusion. During the affray in the house, in which, according to the accused, he contended against at least four persons for a considerable length of time, and though he was somewhat infirm and they—particularly McGowan—were each equal or superior to him in strength, he did it successfully, as regards averting danger of personal injury, no threats were made of taking his life, no weapons were exhibited or mentioned, except by himself. We do not overlook some shadowy suggestions by the accused about some one of the party having had a revolver and that after the assailants went outside the house there were noises like shots. That there were no shots, nor any firearms in possession of the McGowan party, and that the suggestions of the accused in respect to the matter were groundless surmises, as he must have known, seems beyond all manner of doubt. Single handed, substantially, he drove the whole party from the house without receiving any wounds. He had no difficulty in driving all members of the party who were around, as he supposed, away from the house and up the road out of sight, which he did by going outside with his rifle and commanding them to depart at the peril of being shot. A few minutes later he stepped just outside the door again, and was told by one of two men who were visible at some distance away, that McGowan's hat and coat were wanted. The near man, who was not close enough to enable the accused to see who it was, upon being told by the accused he would throw out the hat and coat, threatened, in that event, to throw him out and started to

advance, though told if he did not go away the accused would shoot. It was light enough to enable the latter to see there was only one other man in the vicinity, though it appears there were two, but only one, according to the testimony, was menacing him and that one was a considerable distance away. McGowan had no weapon and made no menace except as stated. The accused had already distinguished himself, as indicated, by coping with several and coming out unblemished. His state of mind, notwithstanding some infirmity claimed, must have been that the one man, even if his associate advanced to aid him, would by no means be formidable. He was quite in obscurity himself, more so than his adversary, as he was in front of the darkened door and the lights in the house had been extinguished. He had several charges in his rifle, probably nine. He was a man of superior courage. That is evident, while his adversary and those with him must have been so intoxicated as to be comparatively harmless to him, as he stood there with the arsenal at his disposal for self-defense. In the circumstances stated he had no reasonable ground to believe but that he could discharge his gun several times to intimidate his adversary and then have ample opportunity to act, efficiently, to take his life, if necessary. The latter was some fourteen feet away, according to the state's evidence, and much further off, we should say, according to the evidence of the accused, when the latter did the fatal deed. He appreciated on the trial that there was no reasonable showing in his evidence for such apprehension of imminent danger as to warrant him in taking deadly aim or to do more than to shoot to intimidate or to maim. So he disclaimed taking aim, said that he fired at random in the general direction of the men without bringing his gun to his shoulder. The physical fact disproves that completely. The place where the ball took effect and its direct course through the body to a lodgment under the skin a short distance below the shoulder blade, demonstrate that the gun must have been

presented in the ordinary way of shooting and aimed at a vital part of the body. If the weapon had been held as the accused claimed, the shot could not have taken effect as it did. In view of the foregoing, we are of the opinion that the circumstances, in any conceivable reasonable view the jury could have taken thereof, did not warrant the accused in taking McGowan's life, as he did. So the errors committed as to self-defense were nonprejudicial.

Refusals of requests on the subject of presumption of innocence, reasonable doubt and explanation thereof, were not prejudicial because proper rules were given in the general charge. Explanatory instructions on the subject of reasonable doubt are proper, and in the view of some courts, and many judges of experience, ought to be given, but whether to do so or not rests in the sound discretion of the trial judge. *Buel v. State,* 104 Wis. 132, 80 N. W. 78. Such explanatory instructions were given in the general charge here to a considerable length and with very fair clearness.

Error is assigned because the court did not give an instruction requested, to the effect that, if the jury were satisfied that any one of the accused was guilty of some offense of criminal homicide beyond a reasonable doubt, but yet entertained a reasonable doubt as to whether it was of a particular or lower degree, the lower offense should be found. Counsel made an attempt to draft an instruction like the one in *Ryan v. State,* 115 Wis. 488, 92 N. W. 271, which was held permissible by construction. The model before counsel was to the effect that in the contingency mentioned the jury should "return a verdict of guilty of the lower offense rather than of the higher." It was supposed the instruction, taken in connection with others given, meant, not that if the jury entertained a reasonable doubt as to whether the accused was guilty of either of two grades of offenses he should be convicted of the lower, but if they believed he was guilty at least of one of them, but there was yet a reasonable doubt as

between the two, the verdict should be for the lowest the evidence established with the requisite degree of certainty. We hardly think the requested instruction would have given the jury any better guidance than the general instructions, which seem fairly to have covered the point. By them the jury were, in effect, told that in rendering a verdict of guilty, it should be for no greater offense of criminal homicide than they believed with the degree of certainty pointed out the person convicted was guilty of.

Error is assigned on this instruction:

"If you find that the testimony of any witness has, when you consider the whole evidence, been impeached, then you may reject the testimony of such witness entirely if you see fit, unless it is corroborated by some testimony or by some evidence which you believe to be true."

Just what idea the learned court had in mind in giving that to the jury is difficult to discover.

It is quite probable that, because of its indefiniteness, the jury did not understand it and so gave it no effect whatever. Such conditions are not entirely novel and do not necessarily involve harmful error as indicated in *Buel v. State, supra.*

If it were thought by the quoted language to instruct on the subject of *"falsus in uno, falsus in omnibus,"* it is unfortunate that the usual and approved language, with which the court was, of course, perfectly familiar, was not adopted. Such course has been frequently advised and is the one most likely to be taken by the careful judge ordinarily, without any admonishment. Comparing the instruction with such approved language, the semblance is so shadowy as to suggest that the trial court had a different subject in mind. If that be so, it explains why the approved form of expression, counsel for accused claim should have been used, was not. Such approved form is formulated usually in this or similar language: *If a witness testifies wilfully falsely as to any material matter in the trial of a case, the jury may, if they*

see fit, but are not bound to, reject all of such witness's evidence not corroborated by some other credible evidence. This, with the following cases showing sanction of it and variations from it which have been held harmful, or at least subject to criticism, will furnish a most certain guide to go by: *Mercer v. Wright,* 3 Wis. 645; *Allen v. Murray,* 87 Wis. 41, 46, 57 N. W. 979; *Little v. Superior R. T. R. Co.* 88 Wis. 402, 407, 60 N. W. 705; *Cahn v. Ladd,* 94 Wis. 134, 68 N. W. 652; *F. Dohmen Co. v. Niagara F. Ins. Co.* 96 Wis. 38, 71 N. W. 69; *Patnode v. Westenhaver,* 114 Wis. 460, 90 N. W. 467; *Suckow v. State,* 122 Wis. 156, 99 N. W. 440; *Hart v. Godkin,* 122 Wis. 646, 653, 100 N. W. 1057.

The language of the charge, "If you find that the testimony of any witness has, when you consider the whole evidence, been impeached," from the context seems to indicate that it referred to any one of various methods stated of showing that testimony is false.

By the reference to the witness's testimony, instead of to the witness, or to some particular item of testimony directed to some material point, the jury must have thought, if they were really influenced by the charge, all of the witness's evidence was intended.

Impeaching testimony is one thing, impeached testimony is another. When testimony is impeached it is not to be considered at all. *White v. McLean,* 47 How. Pr. 193, 199. To say that, if you find the testimony of a witness has been impeached, that is, come to the conclusion it is untrue, then you may reject it if you see fit, seems so plainly absurd that the jury must have concluded the judge did not mean that.

We cannot say the jury probably gave it some sensible meaning. They must have rejected it.

Of course, if a jury comes to the conclusion that a witness's testimony is untrue it is their duty to reject it. They have no discretion in the matter. That does not have to do with

the rejection of testimony, not necessarily impeached, because of some false item of evidence given by the same witness, found to have been wilfully given as true.

Again the words: "If you find that the testimony of any witness has, when you consider the whole evidence, been impeached, then you may reject the testimony of such witness entirely if you see fit, unless it is corroborated by some testimony or by some evidence which you believe to be true," involve dense ambiguity. On its face it is a clear absurdity. There can be no such thing as corroboration of evidence or testimony, found upon the whole evidence to be untrue, so as to render it worthy of belief. How can evidence of a witness, found upon the whole case to be untrue, be corroborated by any other evidence in the record believed to be true? Does not the existence of the former exclude the latter?

Without further analysis of the troublesome instruction, we pass it as was done in *Buel v. State,* 104 Wis. 132, 80 N. W. 78, as so involved as not to be prejudicial because the jury did not in any reasonable probability receive any guidance from it, one way or the other. There was no request on the part of the accused on the subject supposed by them to have been aimed at by the faulty instruction.

The jury were instructed thus: "You will not reject the testimony of any such witness unless you find the testimony of such witness in conflict with the truth." The context shows that the endeavor of the trial court at this point was to impress upon the jury the fact that the evidence of the accused, *Bromley,* should be considered and weighed and given effect to by the rules governing the treatment of the evidence of any other witness. Following that, and rounding out the sentence, the quoted words were used.

Counsel suggests that such words conveyed the idea to the jury that they were authorized to reject the testimony of a witness which they believed to be in conflict with the truth. Or in other words, we take it, reject the testimony of a

witness which they believed to be untrue. That is doubtless right. Wherein is the infirmity? We cannot discover any. Of course, they were not only authorized, but it was their duty to reject such testimony. That is so plain that the jury did not need any special instructions in respect to it.

This language was given to the jury:

"You will not be justified in disregarding your convictions simply because you are acting as jurors when you would be satisfied to act upon such convictions based upon the same facts which would satisfy you and impel you to act in the most sacred and most important transactions which you are called upon to perform as individuals."

That was given as the last part of a paragraph, the preceding part of which was in these words:

"While you should be cautious and scrutinize all of the evidence introduced, not only by the defendants but by the state, and give the testimony of each witness such weight as you believe from the evidence that it is entitled to receive, you will bear this in mind: that if the evidence convinces you in this case of guilt, and such guilt is established by the full measure of proof," etc.

Counsel liken this to the instruction in *Anderson v. State,* 41 Wis. 430, given in explanation of reasonable doubt, which was to the effect that circumstances sufficient to move a reasonable man to act or not, guided by the care governing him in his "ordinary affairs," are sufficient to raise a reasonable doubt calling for acquittal in a criminal case; and to the instruction in *McAllister v. State,* 112 Wis. 496, 504, 88 N. W. 212, in explanation of reasonable doubt, where the term "graver transactions of life" was used instead of "the most important affairs of life." A mere glance at the court's language convinces that it is not open to the criticism of counsel. The words "most sacred and most important transactions which you are called upon to perform as individuals" is quite different from one's "ordinary affairs" or his "graver affairs." It is at least equivalent to "his own most

important affairs and concerns of life," approved in *Butler v. State,* 102 Wis. 364, 78 N. W. 590, as not prejudicially wrong, but suggested in *McAllister v. State, supra,* not to be followed as a model. It is also quite equivalent to "their own gravest and most important affairs of life," approved as permissible in *Secor v. State,* 118 Wis. 621, 636, 95 N. W. 942.

Why not use the phrasing of so important a principle which has been approved as strictly accurate over and over again, instead of venturing to use one which may be merely considered permissible, or mildly and not prejudicially wrong, yet be fruitful of so much difficulty to public and private interests? Why not say that, *if one has a doubt which would cause an ordinarily prudent man to pause and hesitate to act in the most important affairs of life,*—he has a reasonable doubt within the meaning of that term as used in the universal law? *McAllister v. State, supra.* Or if the idea is to be given exclusively as in this case, why not use the words approved in *Secor v. State, supra,* or similar words:

"Guilt is proven beyond a reasonable doubt when all the evidence in the case, clearly, impartially, and rationally considered, is sufficient to impress the judgment of ordinary reasonable and prudent men with a conviction upon which they would act without hesitation in . . . the most important affairs of life."

However, it seems that the instruction as a whole, in connection with later full instructions on the meaning of reasonable doubt and the presumption of innocence, must have meant to the jury:—if you are convinced as men from the evidence of guilt by the full measure of proof, *i. e.* beyond a reasonable doubt; to that degree of certainty "which would satisfy you and impel you to act in the most sacred and most important transactions of your lives, you should not disregard your convictions and act differently because you are jurors." We cannot condemn the instruction though we cannot commend it as worthy to be followed as a perfect example.

Complaint is made because the jury were told that it was important for them to consider whether McGowan or any of his companions were armed, or *Bromley* had reason to believe that they were, as bearing on his claimed justification for using his rifle, and it was said, in effect, that it was not to be presumed without evidence, that one would do an unlawful act, such as carrying concealed weapons. We perceive no error in that. On the whole, it was, perhaps, too favorable to the accused, since, as we have indicated, there was little or no reason whatever—the latter it seems—for the accused to believe his adversaries were armed or that they were so in fact.

Error is assigned because the court said:

"If you believe and find from the evidence that defendant *Bromley* first assailed the deceased, Thomas McGowan, for the purpose of provoking an affray and difficulty with the deceased, Thomas McGowan, and that said *Bromley* intentionally conducted himself so as to bring on the assault and affray as it took place in his house, then the said defendant is not entitled to the plea of self-defense." And:

"If any assault was committed by the late Thomas McGowan on any of the men present there in the house as a result of such conduct of defendant *Bromley,* he is not excused or justified in the shooting which took place immediately afterwards."

The instruction cannot be justified. Clearly what occurred in the house did not necessarily preclude the accused from exercising his right of self-defense regardless thereof some time afterwards outside the house. There is nothing to show that what occurred outside, immediately preceding the homicide, was necessarily a part of the transaction which commenced in the house. The latter had ended. McGowan had left and *Bromley* had a right to prohibit him from returning, and had a right to stand his ground against an invasion of his premises or an attack upon himself, not presently wrongfully efficiently induced by him. However, what has already been

said makes the instruction nonprejudicial, because there was no condition, reasonably calling for exercise of the right of self-defense, at the time the fatal shot was fired.

The sheriff, who first had *Bromley* in custody, testified that he said, when *Miller* was neither present nor represented by counsel, "she handed me the gun." The officer who held the preliminary examination testified that *Bromley* said before him, "*Miller* did not do anything but hand me the gun;" neither of the accused being then represented by counsel. The question put to the sheriff on the subject was objected to, but solely because *Miller* was not present when the declaration was made. The question to the examining magistrate was not objected to at all. The court was requested on behalf of *Miller* to instruct the jury to disregard the evidence of both the sheriff and the examining magistrate, because the statement of *Bromley* in neither case was in her presence. The requests were refused and the court instructed the jury that:

"When evidence has been admitted in the trial of a case tending to establish conspiracy, any declaration made by either of the conspirators, even if made in the absence of the other, is admissible in evidence although only one conspirator may be on trial, and the jury may act upon it. This rule applies to any declaration or admission, if you find that any such was made by the defendant *Bromley,* as to any act done or thing said by his codefendant, *Belle Miller,* which tends to show she in any way aided in compassing the death of the late Thomas McGowan."

The instruction as to the sheriff's evidence should have been given as it was mere hearsay, and as to both because the admissions of one of two persons concerned in a criminal act, after the fact, are not evidence against the other. Those principles are very familiar. The mere inaccuracy of counsel in reciting that *Miller* was not present when the statement was made the second time, and in not grounding the request on the fact that an admission after the fact by one is

not evidence against the other, should have been obviated by the court. In such a serious case, facing such a plain situation, governed by such very plain rules, the trial court should not allow the rights of an accused person to be jeopardized, imperiling such person with danger of imprisonment for life, because a correct request is not based on the proper ground. We agree with counsel for the accused, *Miller,* that the rule in *Montgomery v. State,* 128 Wis. 183, 107 N. W. 14, is to that effect, and if not it should be sufficiently developed to meet the case.

That admissions of one of two or more co-conspirators, after the fact, are not evidence against his associate; that only such declarations are evidence as are made during the prosecution of the conspiracy, seems too elementary to require discussion. The rule is laid down in standard works thus:

"When the common design is at an end, whether by accomplishment or abandonment, no one of the conspirators is permitted by any subsequent act or declaration of his own to affect the others." Whart. Crim. Ev. (9th ed.) § 699.

That doctrine is universal and is as old as the common law at least. *Baker v. State,* 80 Wis. 416, 50 N. W. 518; *Schutz v. State,* 125 Wis. 452, 104 N. W. 90; *Schultz v. State,* 133 Wis. 215, 222, 113 N. W. 428.

The court not only committed plain error by not excluding the evidence of *Bromley's* declarations as to *Miller,* but intensified the same in a high degree by giving the instruction to the effect that the objectionable evidence was entitled to consideration if evidence had been introduced "tending to establish conspiracy." That is, the jury were definitely informed that if evidence before them tended to prove a conspiracy existed between *Bromley* and *Miller* respecting the transaction in question at the time thereof, then declarations of *Bromley* either before or after the consummation of it were evidence against *Miller.* The crowning error therein is that mere evidence tending to prove a conspiracy was made suffi-

cient to give efficient dignity to the declarations of one of the alleged conspirators against the others. It does not seem profitable to discuss error so plain.

It is fundamental in the law of evidence that the rule making declarations of one conspirator evidence against the other is subsidiary, not only to the rule that they must be before conclusion of the purpose of the combination, but to the more basic rule that there must first be evidence establishing, in the judgment of the court, *prima facie,* the fact of conspiracy, the ultimate question in that regard being for the jury and to be found, in cases of this sort, beyond a reasonable doubt, preliminary to considering the declarations, except as to the one making them. Whart. Crim. Ev. (9th ed.) § 698; 3 Stark. Ev. 235 (vol. 2, 7th Am. ed., 327); Roscoe, Crim. Ev. 417, 418; Jones, Ev. § 254 (255).

We will close this discussion by saying that we do not now decide that, since the evidence above involved was not properly objected to, the only objection at any point being that the declarations were not in *Miller's* presence, it was necessarily harmful error to refuse to instruct the jury to disregard it. As hearsay evidence, of course, it did not in any event prove anything, yet it may possibly have been misleading even considered as hearsay. Whether it did, probably, under the circumstances, considered as mere hearsay, as mere declarations in absence of the person affected, we need not express an opinion. It is sufficient that it was offered as *res gestæ,* received as such, asked to be stricken out under such circumstances that the court should have granted the request, then given full effect as *res gestæ,* conditioned upon an event, not efficient for that purpose, under any circumstances. In that particularly prejudicial situation, there is no escape from the conclusion that it was harmful to *Miller,* since it is plain from the evidence that there may have been a felonious design to kill on the part of *Bromley,* not participated in in the slightest degree by her.

Error is further assigned on behalf of *Miller* because the court said to the jury that, if she "had any just cause for complaining against said McGowan, she should have taken the same into court, for no person is justified under the law in taking the law into his own hands." That, of course, involved a judicial suggestion that there was evidence tending to prove that *Miller* took the law into her own hands by participating in the shooting of McGowan, and in characteristics of it essential to the full offense charged. The court probably would not have given that instruction had it been appreciated that the declarations of *Bromley* above discussed were not evidence against *Miller*. Under all the circumstances heretofore shown, and a situation yet to be discussed, the instruction was prejudicial.

It is suggested that the court committed error in charging the jury that they could not, in any event, convict one defendant of one offense of criminal homicide and the other of another.

The learned trial court seems to have proceeded on the theory that the evidence was sufficient to show a conspiracy, and if *Miller* was connected with the homicide at all it was, necessarily, pursuant to a preconceived plan to slay McGowan or to do him some grievous bodily harm, antedating the commencement of the affray in the house, including the assault she made on McGowan with the bottle, and that all things done up to and including the final consummation,—were but steps or circumstances in carrying out the preconceived plan. We cannot see it that way. *Miller* may have had an understanding with *Bromley* to punish McGowan, which was operative up to and inclusive of the fatal act, and yet she not have had the remotest idea of taking his life or doing more than to chastise him roundly for having abused her upon some previous occasion. She may have participated in a design to assault him if he came back for his hat, pursuant to which design *Bromley* went out to lie in wait for the

return which he naturally expected. If she did there is no more than a well grounded suspicion thereof. He must have apprehended that, on that cold March night, McGowan would not go on his long journey home, minus his coat and hat. It was possible that the design to kill was formed in his mind before he went out with the rifle, or after he went out and *Miller* had no such extreme purpose, or reasonable ground to expect such on the part of *Bromley,* yet they have been in perfect harmony as to inflicting bodily harm upon McGowan with or without heat of passion on her part, rendering her guilty of some lower degree of criminal homicide than the highest.

There is left on the merits to be considered exceptions to the refusal to discharge *Miller* because of there being no evidence to warrant conviction of her for any offense included in the information, and the exception to the refusal to grant a new trial because of the verdict being without evidence to support it. They will be considered together.

We have already seen, the declarations of *Bromley* as to *Miller's* connection with the homicide, to which the learned circuit judge gave great significance, were not competent evidence against her and should have been withdrawn from consideration of the jury. With those declarations out of the case, we are at a loss to see any definite evidence that the woman participated in the design to kill or had anything to do with the trouble after the riot in the house ended. There is the merest scintilla of evidence that she was seen with the gun in her hand and, at best, a well grounded suspicion that she obtained the gun from the north room and gave it to *Bromley* in the room where the affray took place, but after it was over. She made no threats. She did not use a gun at the time there were two available. She did not say anything to *Bromley* about shooting McGowan. She seems, from the evidence, to have dropped entirely out of sight before *Bromley* went out to stand before his door in wait for Mc-

Gowan, whom he expected to return for his coat and hat. For aught that appears, except by mere surmise, she did not have any connection whatever with the difficulty, after McGowan was driven from the house, much less participate in the wicked design formed in the mind of *Bromley* to slay him.

In view of the very shadowy connection, at least, of the woman with the scene which commenced when *Bromley* stepped out with his rifle and culminated with the fatal act, is there any fair room in the evidence for a conviction beyond any reasonable doubt that she is guilty of any offense of criminal homicide? How can we say, with that consideration for human liberty due to the humblest individual, that such a situation would not be so uncertain as to cause one to pause and hesitate in the most important affairs of life, much less that in any reasonable view it warrants a conviction which would impel a reasonably prudent man to act in the most important affairs of life? Is there any room in the record for such saying? After careful search we have been unable to find any.

To analyze here the evidence showing clearly and in detail the basis for our conclusion would extend this opinion to a very great length. It is not best to do that. The general reasons given must suffice. Had the court not informed the jury they could not find *Miller* guilty of a lesser degree than they did *Bromley,* they doubtless would have rendered a far different verdict as to her. Had they not been made to understand that if there was any sort of understanding between the two as to chastising McGowan, then her overt connection with the difficulty commencing when she used the bottle on the deceased necessarily continued to the end and *Bromley's* purpose at the last was her purpose, and had they not understood that the declarations of *Bromley* after the fact were strong evidence against her, it seems certain that they would have acquitted her. Moreover, had the court viewed the

case uninfluenced by errors we have seen occurred, doubtless the woman would have been discharged before the final close of the trial for want of evidence to convict her.

A question of practice is raised as to whether, conceding that motions in arrest of judgment were made before the motion for a new trial, the latter were not waived, foreclosing all questions dependent thereon.

The learned attorney general takes the affirmative of the foregoing, relying upon the practice before the Code. There is no question but that the motion for a new trial was seasonably made and decided, unless it was waived in the manner claimed, and there is no question as to there having been any prejudicial delay in making the motion.

Now we will say, first, without taking time to go into the subject at length, that even under the common-law practice a motion for a new trial was not waived, as a matter of course, if it was preceded by a motion in arrest of judgment. Second, we have no such thing under the Code as a motion in arrest of judgment, in the technical sense with the common-law procedure and limitations appertaining thereto. We have the motion in arrest of judgment, so called, for the purpose of challenging the right to hold the accused notwithstanding the conviction upon grounds common to the ancient motion and also merely staying the execution of the judgment to admit of a convicted person having some remedy or taking some proceeding to save his rights in any proper way. But the whole matter is referable to the Code and rules of court and the unwritten law based thereon, dominated by the saving Code provision, where no express written limitation stands in the way, that "The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party. . . ." Sec. 2829, Stats. (1898).

The Code governs procedure in criminal as well as civil cases. A motion for a new trial may be made upon the same

grounds in one as in the other, so far as such grounds are applicable.

A challenge of the right to hold the convicted person no more supersedes the motion for a new trial than a challenge to the jurisdiction of the court over the subject matter supersedes the motion for a new trial in a civil case. The two motions may be made within the time prescribed by statute, regardless of order, and so argued and decided. There are no technicalities of the old practice in respect to the matter, interfering with the due course of justice, along the liberal lines of the Code. As an example of the subserviency of the ancient technicalities to our more liberal system, we have but to refer to *Ullman v. State,* 124 Wis. 602, 103 N. W. 6.

By the Court.—The judgment as to the plaintiff in error *Stephen Bromley* is affirmed. The judgment as to the plaintiff in error *Belle Miller* is reversed, and the cause remanded with directions to grant the motion to discharge. The warden of the state prison is directed to deliver the said *Belle Miller* into the custody of the sheriff of Taylor county, she to be held in such custody until discharged pursuant to this direction.

DODGE, J., dissents in *Bromley v. State.*

A motion for a rehearing in *Bromley v. State* was denied April 20, 1909.

tract. Evidence was allowed showing that *Barry,* as before indicated, placed his name on the paper before delivery. He was permitted to testify that when he signed at Milwaukee, neither the maker nor the payee being present, he did so with the mental purpose to become an indorser only.

On that state of the case each side moved the court for a verdict and the motion on behalf of the defendant was granted, the one on the part of the plaintiff being denied.

For the appellant there was a brief by *Winkler, Flanders, Bottum & Fawsett,* and oral argument by *C. E. Monroe.*

For the respondent there was a brief by *McCabe & Dahlman,* and oral argument by *L. A. Dahlman.*

The following opinion was filed March 9, 1909:

MARSHALL, J. It is the opinion of the court that the contract is governed by the law of the state of Michigan. Contrary to the law here, by the decisions of the supreme court of such state, the *prima facie* indication, by the mere fact of the name appearing on the back of the note, was rebutted by proof that it was so signed before delivery. To that extent proof of the circumstances under which the name was signed was admissible. But was the *prima facie* showing so made, under the Michigan law, that *Barry* became liable as a joint maker, rebuttable by proof of his mental purpose in signing as he did, not communicated to any one? We fail to find anything in any of the decisions offered in evidence going that far, or anything to that effect in any other decision cited to our attention, or which we have been able to find.

True, the law of Michigan is that such a contract as respondent made is ambiguous and that proof of all circumstances of making it may be given in evidence to enable the court to construe it. The law is that way, generally. There are instances of its having been carried so far, in case of a note of the sort under consideration, as to sanction admission of evidence of what the signer and the person or other parties

to the transaction of signing said on the occasion, but there is no instance of the kind in Michigan, so far as we can discover.

Proof of the surrounding circumstances of the making of a contract does not mean proof of what the parties said at the time of such making, much less what a party said or thought, in a purely private way. One is evidence to enable the court to construe the contract. The other evidence to vary it. The former is admissible on familiar principles. The latter is not upon principles quite as familiar.

This court held in *Steele v. Schricker,* 55 Wis. 134, 12 N. W. 396, that

"Oral conversations had between the parties to a written contract cannot be received as explanatory of the writing. Such conversations do not come within the rule that 'you may show the facts surrounding the parties at the time, and the situation in which they were placed, in order to interpret the meaning of what they said in their contract.' . . . 'Evidence which is calculated to explain the subject of an instrument is essentially different in its character from evidence of verbal communications respecting it.'"

Our books are replete with statements and applications of that rule. *Brittingham & H. L. Co. v. Manson,* 108 Wis. 221, 84 N. W. 183; *Blackman v. Arnold,* 113 Wis. 487, 89 N. W. 513; *Excelsior W. Co. v. Messinger,* 116 Wis. 549, 93 N. W. 459; *Loree v. Webster Mfg. Co.* 134 Wis. 173, 114 N. W. 449. It has been applied in many instances to preclude admission of evidence of what was said between parties to commercial paper, at the time of the making thereof, to vary its terms: as that it might be paid in bank notes (*Racine Co. Bank v. Keep,* 13 Wis. 209); or that the note should not be negotiated by the payee (*Knox v. Clifford,* 38 Wis. 651); or that a party purporting to be bound as a payee or indorser should not be so bound (*Davy v. Kelley,* 66 Wis. 452, 29 N. W. 232); or that the indorser placed his name on the note

with the understanding that his indorsement should be without recourse (*Eaton v. McMahon*, 42 Wis. 484); and many more like instances. The rule is the same in Michigan.

Gumz v. Giegling, 108 Mich. 295, 66 N. W. 48, is quite like this case. Proof was made that the person who placed his name on the back of the paper, he not being the payee, did so before it was delivered, making him, by Michigan law, a joint maker. He then offered proof that when he signed it was agreed he should not be held liable. The evidence was held inadmissible because it tended to vary the terms of a written contract by parol evidence. The same principle was applied in *Phelps v. Abbott*, 114 Mich. 88, 72 N. W. 3.

The citations are in harmony with the decisions offered in evidence when it is understood that the right to prove the circumstances characterizing the signing of a note does not include proof of what the parties to the contract said at or before the time of signing, or what one said or thought in a private way.

It follows that, while respondent would not be held liable on the note if it were a Wisconsin contract, because in that event his liability would be that of an indorser, it being a Michigan contract, he is liable as a joint maker, having signed the paper before delivery; that neither by the laws of Michigan nor the laws of Wisconsin can the apparent obligation respondent assumed by signing as he did, be varied by proof of his mental purpose in the transaction, whether communicated to other parties to the note or not. So the motion for a verdict in plaintiff's favor should have been granted.

By the Court.—The judgment is reversed, and the cause remanded with directions to render judgment in plaintiff's favor as prayed for in the complaint.

A motion for a rehearing was denied April 20, 1909.

KUICH, by guardian *ad litem*, Appellant, vs. MILWAUKEE BAG COMPANY, Respondent.

February 17—April 20, 1909.

Master and servant: Personal injuries: Negligence: Failure to warn: Machinery: Guards: Statutes.

1. Evidence that a servant, injured while feeding bags into a printing machine, had performed like service for several months in a proper and competent manner without showing want of physical capacity or strength, and that nothing had occurred to apprise her superiors, nor did she inform them, that she was being physically overburdened or taxed to exhaustion, does not convict the master of failure to exercise ordinary care with respect to the servant in permitting her to work and in keeping her at work at the time of the injury.
2. A servant in feeding bags into a printing machine under such circumstances as to apprise her of danger if her fingers were caught by the nippers grasping and drawing the bags into the machine, and who had been engaged in similar work for several months and possessed the necessary intelligence and information to understand the danger incident to her work, is not so situated that her master is required to instruct or give warning as to the danger of injury in her employment.
3. Where a master has work by machinery performed in the usual manner and under ordinary conditions, and the practical operation of the machinery requires that the operator have an open and unobstructed field in front of rotating cylinders and other parts of the machine in order to properly perform the service required, and it is manifest that a guard or fence would not be a protection nor lessen the danger incident to the operation of the machine, no situation is presented charging the master with negligent omission to fence or guard the machine, even assuming, but not deciding, that the situation is controlled by sec. 1636*j*, Stats. (1898).

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

This is an action to recover damages for personal injuries alleged to be due to the negligence of the defendant. The defendant is a corporation engaged in the manufacture and

printing of bags. *Martha Kuich* was fourteen years and seven months old at the time she was injured. She was about four feet seven and one-half inches in height and weighed between eighty-five and ninety pounds. Her right eye had been removed when she was two years old and she had worn a glass eye in the socket since she was ten years of age. She had had about three and one-half years of schooling at a Polish parochial school.

In the process of printing the operator takes the bags, one at a time, from the pile which is placed upon an inclined feed board. The bag taken from the pile is placed against two guides, which rest on the feed board near its bottom edge. On the side of the feed board is a third guide against which the bag is placed by the same movement that places it against the other guides. This completes the feeder's work. The bag is then seized by a line of nippers working automatically, which grasp the bag so placed by the operator and draw it in between two large, heavy rollers. The process of printing is completed by the automatic operation of the machine. At the same time that the bags are grasped by the nippers, which are attached to the lower roller, the two guides at the bottom edge of the feed board are automatically raised to permit the bags to be carried between the rollers. The lower end of the guide at the side of the feed board, beyond which it is not necessary for the feeder's hand to go in the process of feeding, is about five and one-half inches from the nippers when they seize the bags. While the plaintiff was feeding bags into a printing machine her left hand was caught by the nippers and her hand and arm were drawn between the rollers. Two of her fingers were torn off, and the other two fingers were so crushed and bruised that it was subsequently necessary to remove them. Her hand and arm were also crushed and bruised.

Plaintiff had worked for the defendant for about five months at the time she was injured. During that time she

had gradually been given work requiring increased knowledge and skill. She had worked for varying lengths of time at machines which did similar work and which operated less rapidly than the one at which she worked when injured, which was the fifth machine at which she had worked. She had been working at this machine for three weeks before receiving her injuries. On the day of the injury the defendant desired to finish printing a large order for bags, and the machine at which the plaintiff worked was speeded up to a higher rate than that at which the plaintiff had theretofore worked. She had worked under this strain for about nine hours that day and was fatigued. She testified that she had refrained from responding to the calls of nature because of the pressure of the work, the fear of reprimand from the foreman, and because she might be the subject of ridicule for the boys who were working in the same room if they observed her leaving her work. The plaintiff also alleges that the defendant failed to warn her of the danger of having her hand caught in the nippers, and failed to provide a safe machine and to furnish a guard which would prevent the hands of the operator being caught by the nippers. None of the other alleged grounds of negligence are now insisted upon by the plaintiff. . . .

There was evidence in the case that about ten minutes before the injury plaintiff was overfatigued, that her sight became momentarily clouded, and that she was somewhat dizzy. The evidence as to whether or not plaintiff had been instructed in the operation of the machine was in conflict. As to the alleged negligence of the officers of the defendant in allowing plaintiff, with knowledge of the fact that she had the use of but one eye, to do work which required the exercise of ability to judge distances, there was evidence that it was impossible to judge distances accurately with but one eye. There was also evidence that ability to judge distances under these conditions was a matter of practice and experience.

There was no evidence that the plaintiff had ever been warned of the particular danger which caused the injuries. In the operation of the machine the feed board is close to the rollers and the nippers. The rollers, nippers, and guides are in plain view. The operator could see all of these parts of the machine and observe their operation. There was some evidence that the guide at the side of the feed board was loose and that the platform upon which the feeder stood was worn smooth and slippery, but these conditions were not shown to have shared in producing the injuries.

At the conclusion of the evidence the court directed a verdict in favor of the defendant. This is an appeal from the judgment dismissing the complaint.

For the appellant there was a brief by *Glicksman & Gold,* and oral argument by *W. L. Gold.*

For the respondent there was a brief by *Sheridan & Mueller,* attorneys, and *A. J. Schmitz,* of counsel, and oral argument by *J. A. Sheridan.*

The following opinion was filed March 9, 1909:

SIEBECKER, J. It is claimed that the defendant negligently permitted and exacted labor from the plaintiff which she, in view of her tender years, was incapable of performing for want of sufficient physical strength and because of excessive fatigue. The facts disclose, as above stated, that plaintiff had been engaged in operating bag-printing machines and that her work consisted in feeding bags into the printing machines. She had performed this service for several months prior to the day of the accident, and so far as shown performed the service in a proper and competent manner. It appears that throughout this period she showed no want of physical capacity or strength to endure and perform the service. Nor did the fact that she had but one eye seem to affect her ability to properly perform the service. The plaintiff testifies that on the day in question she became extremely fatigued

toward the latter part of her working hours and that the sight of her eye became clouded at times. It is urged that this was due to the unreasonable exactions of the defendant in demanding that she perform an unreasonable amount of labor in view of her tender years, immature judgment, and want of bodily strength. On the day in question she was put at the task of feeding a larger number of bags into the printing machine in a certain number of hours than theretofore. The manner of doing the work on this day was in all respects the same as had been used in operating other machines, with the exception that this day's work required her to feed a larger number of bags per hour than she had ever handled theretofore. There is no evidence showing that the rapidity of operation was unreasonable for an ordinarily competent operator. So far as appears, plaintiff performed this service in the usual way during the day. Nothing occurred to apprise her superiors, nor did she inform them, that she was being physically overburdened or that her bodily strength was being exhausted so as to overtax her. The service she performed had been and was being rendered by minors, and the impropriety of engaging plaintiff to perform the service, as not within the compass and skill of minors of plaintiff's age, intelligence, and bodily strength, is not shown. From the facts and circumstances adduced it appears that the defendant exercised ordinary care with respect to plaintiff in permitting her to work and in keeping her at it at the time of the accident. There is no evidence tending to show that the defendant was negligent in this regard.

Another claim of liability is that defendant negligently omitted to instruct the plaintiff as to the proper way in which to perform her service and to warn her of the danger of having her hand caught in the nippers, and of the consequent liability of being injured by having her hand and arm drawn into the printing machine. This claim is made upon the ground that the danger of having her fingers caught in the

nippers and thereby having her hand drawn between the cylinders of the press was not so open and obvious that a person of her age, intelligence, and discretion would be apprised thereof by observation of these parts of the machine and its operation. The contention that she did not know how firmly the nippers would hold her fingers, if seized by them, and that she might well believe she could, if caught, release her fingers without danger, is against the clear and plain inference to be drawn from the facts in evidence. The operation of the nippers in grasping the bags and in holding and drawing them into the machine shows that the operation of this appliance must be fraught with danger to a person whose fingers might be caught by the nippers. It does not seem that any operator of average intelligence could fail to appreciate that if his fingers were grasped by these nippers the inevitable consequences would be dangerous to him. The facts cannot reasonably be interpreted to permit of any other inference, and raise no question for solution by the jury. We perceive no escape from the conclusion that the plaintiff was charged with knowledge of this obvious situation so presented to her in operating the machine. The evidence is without dispute that she had been engaged in the operation of these printing machines for several months and that she possessed the intelligence and information to understand the danger incident to her work. The employer was therefore not required to instruct her or give her warning as to this danger. This principle has been applied in numerous instances by this court, some of which are referred to in *Horn v. La Crosse Box Co.* 131 Wis. 384, 111 N. W. 522, and *Groth v. Thomann,* 110 Wis. 488, 86 N. W. 178.

It is also urged that the court erred in directing a verdict for the defendant because the evidence tends to show that it was negligent in failing to guard the feed place so as to prevent her hands from coming in contact with the operating devices at this point, which it is alleged were "so located as to

be dangerous to employees in the discharge of their duty." The trial court held that the facts and circumstances presented no evidence of such negligence. So far as appears, the defendant operated these printing machines and had the work performed in the usual manner and under the ordinary conditions.

The method of operation, as carried on by the plaintiff under defendant's direction, must then be examined to determine whether the situation presented was one from which a jury would be warranted in concluding that the defendant negligently had omitted to guard or protect the machine at which plaintiff was working. The evidence is clear that the practical operation of this printing machine requires that the operator have an open and unobstructed field in front of the rotating cylinders, the nippers, and the guides at the edge of the feed board in order that the bags may properly feed into the printing press. It is manifest that the placing of a board across this area in front of rollers and above the nippers, as suggested by appellant, would obstruct the operator's view and interfere with his manipulation of the work, and thus interfere with and tend to prevent defendant from conducting its business in a proper and customary way. Nor is it manifest that such a guard would be a protection against or lessen the dangers incident to the operation of printing bags. The situation presented by the evidence suggests no such result, and it cannot, therefore, be said that the defendant was guilty of any negligent omission in this regard, assuming, but not deciding, that the provisions of sec. 1636*j*, Stats. (1898), control the case.

We find no reversible error in the record.

By the Court.—Judgment affirmed.

TIMLIN, J., took no part.

A motion for a rehearing was denied April 20, 1909.

SPARKS, Administratrix, Appellant, vs. WISCONSIN CENTRAL RAILWAY COMPANY, Respondent.

March 10—April 20, 1909.

Railroads: Personal injuries to employees: Negligence: Evidence: Car inspector: Master and servant: Rules governing servants: Fellow-servants: Statutes: Proximate cause: Anticipation of probable consequences: Contributory negligence: Printed case: Costs.

1. The moving of cars through a railroad yard in which various employees are constantly working upon and about the tracks, without any signal or lookout at the forward end of the moving cars, will support a finding of negligence, in an action for injuries to a servant caused thereby.
2. Negligence in moving cars through a railroad yard without any signal or lookout at the forward end thereof is the negligence of the company if it has prescribed no rule requiring such precautions; or it may be that of fellow-servants if they fail to comply with sufficient and adequate rules.
3. Under sec. 1816, Stats. (1898), it is immaterial whether injuries to a car inspector were caused by failure to prescribe sufficient and adequate rules for the government of railroad employees, or by failure of fellow-servants to comply with the rules prescribed.
4. It is not necessary, to make a negligent act the proximate cause of an injury, that the particular injury should have been anticipated, but only that, in the exercise of reasonable foresight and intelligence, some injury to some person should have been anticipated as within the probabilities.
5. Mere carelessness from which no injury to another can be anticipated is not negligence in the legal signification.
6. The unwarned shunting of cars over tracks, in railroad yards where men are variously employed upon and about tracks upon independent work engrossing their attention, supports an inference of the master's negligence and its causal connection with the servant's injuries.
7. Since railroad employees must necessarily place themselves in dangerous positions in the course of their employment, they are not necessarily negligent in so doing, as acts on their part which are customary and proper would be obvious negligence in others.
8. Whether or not a car inspector, killed by being struck by a caboose step while, in the discharge of his duties, he was stooping to inspect another train moving in the opposite direction, was

thereby guilty of contributory negligence in placing himself in a position of danger, presented a question for the jury, and hence it was error to direct a verdict for the defendant. MARSHALL, J., dissents.

9. A printed case reproduced apparently from the reporter's minutes, without eliminating unnecessary repetitions or matter wholly immaterial to the questions raised on appeal, violates Supreme Court Rule 6, and, on reversal, costs for its printing are denied.

APPEAL from a judgment of the circuit court for Wood county: CHAS. M. WEBB, Circuit Judge. *Reversed.*

Action for causing death of plaintiff's husband, William Sparks, by negligence. Deceased was a car inspector in defendant's yards at Abbotsford, his duty being, among other things, to make an inspection of the running gear of the cars in trains as they passed into the yards from their trip. To do this it was necessary for him to take a crouching or sitting position a few feet away from the track upon which the train ran, so as to enable him to see the wheels and brakes of a car as it approached him and also to see the numbering of the car in which any defect was discovered. The yard at Abbotsford consisted of about eight nearly parallel tracks running east and west, with a space between tracks of eight feet. These tracks were used for the purposes of breaking and making up freight trains, in the doing of which work cars were moved about on the various tracks, ordinarily at a speed of two or three miles an hour. There was evidence of a rule and custom to have a man in front of any car which was pushed by an engine, either on the ground or on the rear of such car, in order to look out for any person in danger, employees or otherwise. On the day in question deceased assumed the duty of inspecting a train coming from the west on what was called north track No. 2, and placed himself within about a foot of north track No. 1, which was south, he facing north and slightly westward in order to perform his duty. Eastward of him some fifty feet or more stood a ca-

boose on track No. 1 with brakes set, to which still eastward were to be attached the cars making up a train for departure, as deceased knew. This process consisted of collecting cars from other parts of the yard and pushing them back onto the switch and coupling them to this caboose, and did not involve necessity or probability of any moving of the caboose more than a foot or two by reason of impact. While deceased was inspecting his train the switching crew found it necessary to move the caboose backward toward him in order to make more room for cars on track No. 1, and it was pushed westward slowly some hundred feet without any person in position to observe the track in front of it, and without warning. Deceased was so near that track that the steps of the caboose caught his shoulder, threw him over in front of the wheels, and he was killed. A verdict was directed for defendant and judgment entered, from which the plaintiff appeals.

For the appellant there was a brief by *Barton & Kay* and *R. E. Andrews,* and oral argument by *Humphrey Barton.*

For the respondent there was a brief by *Walter D. Corrigan* and *W. A. Hayes,* and oral argument by *Mr. Corrigan.*

DODGE, J. The direction of verdict was predicated upon the conclusion of the trial court that the evidence failed entirely to show negligence of defendant proximately causing the injury and also that contributory negligence on the part of deceased appeared conclusively. Such decision is the error assigned and presented for consideration.

1. The moving of cars through a yard in which various employees are constantly employed upon and about the tracks, without any precaution in the way of signal or lookout at the forward end of the moving cars, is conduct which, under the decisions of this court, will support a finding of negligence. If there is no rule or regulation for such precautions, that may be negligence of the employer. *Promer v. M., L. S. & W. R. Co.* 90 Wis. 215, 63 N. W. 90; *Bain v. N. P. R. Co.*

120 Wis. 412, 98 N. W. 241; *Polaski v. Pittsburgh C. D. Co.* 134 Wis. 259, 114 N. W. 437. If there are sufficient and adequate rules, but failure to comply with them, the negligence may be that of fellow-servants. *Smith v. C., M. & St. P. R. Co.* 91 Wis. 503, 65 N. W. 183; *Portance v. Lehigh Valley C. Co.* 101 Wis. 574, 77 N. W. 875. The distinction is, however, immaterial in the case of railroad operations. Sec. 1816, Stats. (1898). There was in this case evidence tending to prove that regulations requiring lookout were duly prescribed, but that no such, or any, precaution was in fact taken. No person was in position to see whether any employee was in danger or to give him warning of the approaching train or car, and no signal was given. There was evidence, therefore, of negligence for proximate results of which defendant would be responsible. Indeed the trial court apparently did not differ from this view, but based the direction of verdict upon absence of proximate causal relation between defendant's want of care and the deceased's injury, because the former could not have anticipated that the latter would, in performing his duties, have done the particular acts proved against him; in other words, that this particular accident and injury to this particular employee was not within reasonable anticipation. That is not at all essential to proximate causation. It is enough that defendant should, in exercise of reasonable foresight and intelligence, have anticipated as within the probabilities some injury to some person. *Meyer v. Milwaukee E. R. & L. Co.* 116 Wis. 336, 93 N. W. 6; *Schmeckpepper v. C. & N. W. R. Co.* 116 Wis. 592, 595, 93 N. W. 533; *Feldschneider v. C., M. & St. P. R. Co.* 122 Wis. 423, 431, 99 N. W. 1034; *Morey v. Lake Superior T. & T. Co.* 125 Wis. 148, 156, 103 N. W. 271; *Owen v. Portage T. Co.* 126 Wis. 412, 419, 105 N. W. 924. The cited cases declaring the absence of warning or lookout to be legal negligence are predicated upon the view that such probability of injury exists, for mere carelessness from which no injury to another

can be anticipated is not negligence in the legal signification. *Compty v. C. H. Starke D. & D. Co.* 129 Wis. 622, 109 N. W. 650. Apart from such authority, however, we deem an inference entirely justifiable that the unwarned shunting of cars over tracks, in yards where men are variously employed upon and about such tracks upon independent work engrossing their attention, is so fraught with danger of collision with such employees that any reasonable man should anticipate some injury as within the probable results of such practice. We must therefore hold that the question of defendant's negligence and its causal connection with deceased's injury was supported by some evidence.

2. The more doubtful question is that of contributory negligence. Deceased, it is asserted, placed himself in a position of danger. But railroad employees necessarily place themselves in dangerous positions. Acts on their part are customary which would be most obvious negligence in others. *Bain v. N. P. R. Co., supra; Hardt v. C., M. & St. P. R. Co.* 130 Wis. 512, 520, 110 N. W. 427; *Hayes v. C., M. & St. P. R. Co.* 131 Wis. 399, 111 N. W. 471; *Polaski v. Pittsburgh C. D. Co., supra; Bucher v. Wis. Cent. R. Co., post,* p. 597, 120 N. W. 518. Indeed the great majority of injuries to railroad employees occur because they place themselves in positions of danger. They are required to do their work hurriedly and be in places to enable its performance expeditiously and effectively and to rely for their security on the ordinary safeguards and care of others. *Fitzgerald v. International F. T. Co.* 104 Minn. 138, 116 N. W. 475; *Karr v. Milwaukee L., H. & T. Co.* 132 Wis. 662, 113 N. W. 62. Being in close proximity to a track is no worse than being upon a track in order to perform one's duty, as in *Polaski v. Pittsburgh C. D. Co., supra.* There was credible evidence tending to prove that the expeditious and effective performance of the car inspector's work required him to be several feet away from the inspected train, because, if so close that

he could not readily transfer his eye from the running gear to the numbers on the sides of the cars, the effectiveness of his discovery of any defects was greatly diminished. He could not place himself nearer than midway between the two tracks, which would be two and one-half feet from the inspected train. But there was evidence tending to show that the space midway between the two tracks was embarrassed by a ridge of ice. Obviously the strained, crouching position which he must assume demanded a safe foothold, and the jury might well conclude that he necessarily assumed the position close to the south track. Probably the unnecessary placing of himself close to a railroad track upon which he might expect cars to be moved at any moment without warning, or without ability to effectively warn him, would be negligence *per se,* but there is evidence tending to negative any such expectation. The caboose, stationary upon this track, with brakes set and intended to be the rear end of the train then being made up, was some assurance to him against the likelihood of any movement of cars where he placed himself. There is evidence that under such circumstances the caboose remained substantially stationary and served as an effective buffer to the cars backed against it. Its presence for the known purpose was an assurance also against any use of that track for other switching operations which might imperil deceased. *Bain v. N. P. R. Co., supra.* Evidence also tended to show that if by any contingency the caboose should need be moved far enough to strike deceased, it would be a very slow movement, and one which the presence of a man in front of it would enable effective warning against, and that such presence and warning was usual and, indeed, required by rules. True, there was some testimony tending to prove abrogation of such rules, but it was not undisputed, and the witnesses were so contradicted and self-contradictory that the jury might well have disbelieved their statements on this subject. From all these considerations we cannot persuade ourselves

that the deceased's conduct is conclusively shown to have been so variant from that ordinarily exercised by ordinary careful men under like circumstances that reasonable minds might not differ as to whether it constituted negligence. We think that question also should have been submitted to the jury.

The printed case on this appeal inexcusably infringes Supreme Court Rule 6, in that there is no attempt to abridge the testimony, which is reproduced apparently from the reporter's minutes in form of question and answer and without eliminating unnecessary repetitions or matter wholly immaterial to the questions raised on the appeal. Counsel owe the duty of relieving the court from wasteful expenditure of time and labor to at least the extent commanded by this rule. Unless they do so, they are by Rule 44 denied costs for printing a case or brief which is not in compliance.

By the Court.—Judgment reversed, and cause remanded for new trial; no costs for printing case.

MARSHALL, J. (*dissenting*). In my judgment the deceased was clearly guilty of contributory negligence in unnecessarily locating himself in the pathway of a car that might move to where he was on the track back of him.

At best, whether there was evidence to carry the question of contributory negligence to the jury is involved in doubt, looking, as we have to, at the record alone. Therefore, by a well known rule the decision of the trial court ought not to be disturbed.

Trial courts are in duty bound to meet such situations, as was met with in this case, frequently. They have been admonished, over and over again, to do so with judicial courage, and when in their judgment there is no reasonable doubt but that the reasonable inferences are all one way to act firmly, as the law requires, by directing a verdict. *Finkelston v. C., M. & St. P. R. Co.* 94 Wis. 270, 68 N. W. 1005.

While trial judges should scan a case, carefully, before

taking it from the jury, when satisfied that there is no room in the evidence for reasonable minds to fairly differ as to the truth of the controversy they should do so without hesitation, and vigorous administration in that regard should be promoted by resolving, upon appeal, all reasonable doubts in favor of their decisions instead of viewing the cases from an original standpoint. That is the logic of our decisions. *Powell v. Ashland I. & S. Co.* 98 Wis. 35, 73 N. W. 573; *Lam Yee v. State,* 132 Wis. 527, 112 N. W. 425; *Hein v. Mildebrandt,* 134 Wis. 582, 115 N. W. 121.

The statutory rule referred to has been much dignified in recent years and has become so firmly and so beneficially intrenched in our jurisprudence that it must be assumed that, though it may be possibly overlooked now and then, or there may be reasonable difference as to when it does and when it does not apply, there is no disposition here to abrogate it or to minimize its effect in respect to speedy termination of litigation and the stability of judgments of trial courts.

SCHOBLASKY, Respondent, vs. RAYWORTH, Appellant.

March 30—April 20, 1909.

Contracts: Parol modification of written contract: Escrow.

A written contract may be modified by parol, without any new consideration, after it has taken effect; but a bill of sale, while it is in escrow awaiting the payment of the purchase money, cannot be modified by parol.

APPEAL from a judgment of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

The complaint averred in substance that defendant sold to the plaintiff and the plaintiff paid for certain personal property, part of which defendant failed to deliver to plaintiff

and part of which was delivered to plaintiff but taken from her upon replevin by the true owner. The defendant, answering, averred that he sold the plaintiff a certain piece of land with the personal property thereon owned by defendant, and executed to the plaintiff a deed of the land and a bill of sale of the personal property. By mistake in drafting the bill of sale other property than that owned by defendant was described therein, although the property really sold was pointed out to the plaintiff. At the time of the delivery of the deed, on or about June 29, 1907, there was a complete and perfect understanding between plaintiff and defendant as to what personal property was owned by defendant and should be delivered to plaintiff, and the bill of sale theretofore and on June 27th executed was by this subsequent agreement modified so as to include only the property really sold. The evidence on the part of the plaintiff tended to show that she had an oral agreement with the defendant for the purchase of the personal property described in the bill of sale, which was evidenced later by the bill of sale, and that part of this property was taken from her by replevin brought by one Richard Nonnemacher, and she offered in evidence the record in the replevin action, which was received without objection. The evidence on the part of the defendant tended to show that after the bill of sale was drafted and signed and while it was at the bank in escrow and when the parties were engaged in correcting some errors in the deed of the real estate by the execution of a new deed, it was agreed between them that some of the personal property in question was erroneously inserted in the bill of sale and that Nonnemacher should have whatever belonged to him, and this was particularly designated, and this contradicted the written bill of sale. No new writing was made to evidence this alleged modification of the bill of sale.

For the appellant there was a brief by *Morson & McMahon,* and oral argument by *S. J. McMahon.* They cited,

among other cases, *Brown v. Everhard,* 52 Wis. 205, 8 N. W. 725; *Kelly v. Bliss,* 54 Wis. 187, 11 N. W. 488.

For the respondent the cause was submitted on the brief of *Henry Hay.* Among other references he cited *Chicago & N. W. R. Co. v. McKeigue,* 126 Wis. 574, 105 N. W. 1030; *Vogt v. Schienebeck,* 122 Wis. 491, 100 N. W. 820; *Kammermeyer v. Hilz,* 116 Wis. 313, 92 N. W. 1107; 4 Am. & Eng. Ency. of Law (2d ed.) 557; *Ward v. Russell,* 121 Wis. 77, 98 N. W. 939; 11 Am. & Eng. Ency. of Law (2d ed.) 344, 348; *Rehbein v. Rahr,* 109 Wis. 136, 85 N. W. 315; *Everts v. Agnes,* 4 Wis. 343; *Prutsman v. Baker,* 30 Wis. 644, 648.

TIMLIN, J. The court directed a verdict for the plaintiff, holding that the parol evidence was inadmissible to contradict the written bill of sale. It has been ruled that a written agreement may be modified after its execution by parol. The modification need not rest on any new consideration. *Montgomery v. Am. Cent. Ins. Co.* 108 Wis. 146, 84 N. W. 175; *Brown v. Everhard,* 52 Wis. 205, 8 N. W. 725; *Kelly v. Bliss,* 54 Wis. 187, 11 N. W. 488; *Ruege v. Gates,* 71 Wis. 634, 38 N. W. 181; *Wis. S. F. Co. v. D. K. Jeffris L. Co.* 132 Wis. 1, 111 N. W. 237.

But it is an essential part of this rule that the parol negotiations effective for modification must take place after the written instrument is executed and in effect. All such negotiations prior to or contemporaneous with the execution of the written instrument are merged in the writing and incompetent to contradict that writing. The bill of sale of the personal property was, at the time of the negotiations in question, deposited in the bank by the seller for delivery to the buyer upon payment by the latter of the purchase money. After the negotiations in question the buyer paid the purchase money and received the bill of sale. The parol agreement was therefore one made, if at all, before the final execution of the written bill of sale and merged in that writing.

Braun v. Wis. R. Co. 92 Wis. 245, 66 N. W. 196; *Owen v. Long,* 97 Wis. 78, 72 N. W. 364; *Caldwell v. Perkins,* 93 Wis. 89, 67 N. W. 29. There was no error in excluding the evidence of the alleged oral modification of the contract.

By the Court.—Judgment affirmed.

STEINBERG and another, Respondents, vs. SALZMAN and wife, Appellants.

March 30—April 20, 1909.

Limitation of actions: Infants: Adverse possession: Color of title: Good faith: Homestead: Actions for accounting: Executors and administrators: Sales of real estate: Liability of purchaser: Rights of heirs: Costs: Printed case.

1. An action to recover real estate in the adverse possession for over ten years of one claiming under an instrument purporting to convey a colorable title is barred, although the action is brought by minors, or those under guardianship, or to meet cases of fraud.
2. An administrator's deed, conveying decedent's homestead pursuant to an order of court in proceedings to sell decedent's lands for the payment of his debts, is color of title within the statutes barring actions to recover real estate held adversely under an instrument purporting to convey title.
3. Title by adverse possession under the ten-year statute as well as the twenty-year statute may be acquired although there is no element of good faith in the entry or in securing the deed under which entry is made, where the ten-year statute is invoked, provided the essentials required by the statute exist.
4. Where real estate itself, in the possession of one holding it adversely, cannot be recovered, the possessor cannot be called upon to account for its value, even though he was guilty of fraud in its acquisition, which was not discovered until shortly before the institution of the action for an accounting.
5. Where an administrator, after selling his decedent's homestead pursuant to order of court, in his final account treated a note given by the purchaser as cash, after more than twenty years the heirs of the decedent cannot recover from the purchaser on

the note, although the administrator has never collected or attempted to collect it.

[6. In such case, the administrator not being before the court, no opinion is expressed as to his liability to account.]

7. The printing without abridgment of the evidence preserved in the bill of exceptions, consisting of the reporter's minutes incorporated *in extenso* therein, is a violation of Supreme Court Rule 6, and warrants denial of costs for printing the case.

APPEAL from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Reversed.*

Action brought by plaintiffs to set aside an administrator's deed and to bar the grantee named therein, and his wife, of all right, title, and interest in the property conveyed thereby, and for such other relief as might be equitable. One William Steinberg died intestate on July 6, 1878, leaving a widow, and three children by a former marriage of the ages of six, seven, and nine years, respectively. The youngest child, William, conveyed his interest in the premises in dispute to his brother, one of the plaintiffs in this action, his sister being the other. At the time of his death Steinberg was the owner of a farm of eighty acres and some personal property. One forty-acre tract was wild and uncultivated. The other was cleared and improved to some extent and had farm buildings thereon and was occupied as a homestead by decedent and his family. He had been married to his second wife, who is one of the defendants in this action, about four months at the time of his death. About four months thereafter she married *August Salzman,* her codefendant. A petition was presented by one Herman Kleeman to the county court, reciting, among other things, that it was necessary to sell the real estate of the decedent to pay his debts. A hearing appears to have been ordered upon such petition, and an administrator was appointed, and thereafter an order was entered directing that sale be made, and the property was sold to the defendant *August Salzman* for $1,300, the appraised value of the farm, which sale was confirmed August 5, 1879. A special guard-

ian for the minor heirs of the decedent was appointed May 20, 1879, and the widow of the decedent and the special guardian of the minors consented to the sale. The administrator's deed was executed August 7, 1879. The personal property was inventoried at $485.92, and thereafter certain property was reported by the administrator as coming into his hands, but not inventoried, amounting to $279.77, making the total personal property $765.69. The homestead forty was appraised at $1,000 and the other at $300. Personal property was awarded to the widow of the inventory value of $292.80. In the final account rendered by the administrator he reports total receipts of $2,065.69. Of this he reports as paid to the widow $433 for her dower interest in the land sold and $292.80 for her personal property selection; $45.02 for expenses of administration and $978.90 for indebtedness. The remainder of $315.97 he reported as cash on hand.

The administrator never paid any of the debts of the decedent. No notice to creditors was ever given and no accounts against decedent's estate were ever legally allowed by the county court. The property purchased by *August Salzman,* and he appears to have purchased the personal property as well as the real estate, was purchased on time and with the understanding that he was to settle with and pay the creditors of the decedent. As a matter of fact he claims to have paid out more money on account of claims than the indebtedness amounted to as reported in the final account of the administrator. The evidence on this point is unsatisfactory, and the proceeding was entirely lawless both as to the manner of taking care of claims and as to selling the homestead, which was exempt from payment thereof and was the property of the minor heirs, subject to the homestead right of the widow. No part of the $315.97 reported in the hands of the administrator was ever paid to the heirs, and the administrator never received such sum of money, but received in lieu thereof the

note of *August Salzman,* which was never paid, except as he claims he paid it by caring for the minor heirs. The two boys worked for him on the farm until they were nearly twenty-one years of age and the girl until she was past eighteen, and none of them attended school except for a few days. The two younger children can neither read nor write and the older one can read a very little. The defendants went into possession of the farm under the administrator's deed and have remained in possession ever since.

The circuit court held, among other things, that gross errors and glaring irregularities were committed in the administration of the estate, which amounted to constructive if not actual fraud; that the defendants, aided by the toil of the heirs of William Steinberg, have greatly improved the real estate, thereby enhancing its value several thousand dollars; that the debts of Steinberg were not properly proven, and the price for which the property was sold to pay the same was agreed upon in advance, and no consideration was received by the administrator when he executed the deed; that the fraud was not discovered by plaintiffs until June, 1905; that the real estate was sold for $200 less than its value; that the note for $352.36 given to the administrator has never been paid, and that the children of the decedent were raised without any education, and were kept in ignorance of all facts pertaining to their father's estate, and that they had by their labor for the defendant *August Salzman* more than earned the board and clothing furnished them while living with said *Salzman.*

As conclusions of law the court found: (1) The administrator's deed was void; (2) there was no authority in law to sell the homestead to pay debts and the debts were not legally proven; (3) constructive if not actual fraud entered into the sale of the real estate, and the defendant *August Salzman* was a party thereto; (4) the plaintiffs' right of action was saved under subd. 7, sec. 4222, Stats. (1898), by reason of the

fact that the fraud was not discovered until 1905; (5) that in view of the very large increase in the value of the farm it would be inequitable to divest defendants of the title thereto, and that the defendant *August Salzman* should pay plaintiffs $200, with interest from August 7, 1879, being the difference between the purchase price of the farm and what it was actually worth, and also the amount of the note given to the administrator, with interest from its date, making a total of $1,586.

Among other defenses interposed the defendants pleaded the following statutes of limitation in bar of the action: Secs. 4211, 4212, 4215, 4207, 3918, 4251, 4233, and subd. 4 of sec. 4221, Stats. (1898). They also interposed a counterclaim asking that their title to the premises in dispute be quieted. Numerous errors are assigned. Those material to a disposition of the case will be referred to in the opinion.

For the appellants there was a brief by *Eberlein & Eberlein,* and oral argument by *M. J. Eberlein.*

John F. Hooper, for the respondents.

BARNES, J. The finding of the circuit court that gross and glaring irregularities were committed in the administration of the estate of Carl Steinberg, which amounted to constructive if not to actual fraud, is a mild-mannered characterization of the acts by which the plaintiffs were deprived of what justly belonged to them, as the undisputed testimony in the case clearly shows. The evidence falls far short of showing that there was not an abundance of property, aside from the homestead, to pay Steinberg's debts. Whether there was or not, it was a purely lawless proceeding to sell the homestead to pay them. No money was received by the administrator on the sale, and none of the claims against the estate of the deceased were examined, proved, or allowed by the county court. Even the balance admitted by the defendant to be due after he settled the claims against the estate was never paid, except

as defendant claims he paid it by caring for the minor children, for which care he was otherwise amply repaid, as the evidence showed and as the court found. It is to be hoped that county judges, administrators, and guardians, whose duty it is to guard and protect the estates of helpless minors from predatory attacks, will not often be so unmindful of their duties and their obligations as they appear to have been in this case.

Notwithstanding what has been said, the plaintiffs cannot recover. Sec. 4211, Stats. (1898), provides that where an occupant enters into possession of any premises under claim of title exclusive of any other right, founding such claim on some written instrument as being a conveyance of the premises in question, and there has been continual occupation and possession of the premises under such claim for ten years, the premises so held shall be deemed to have been held adversely, and sec. 4215, Stats. (1898), provides that an adverse possession of ten years under secs. 4211 and 4212 shall constitute a bar to an action for the recovery of the real estate adversely held or the possession thereof.

The statutes cited, in terms, make no exceptions in favor of minors or those under guardianship, or to meet cases of fraud, and they have been strictly construed in a long line of decisions in this court. Given a written instrument purporting to convey a colorable title, and adverse possession thereunder for a period of ten years, the requirements of the statute are satisfied. Sec. 4218, Stats. (1898), does not aid the plaintiffs, as no action was commenced within the time limited by that section. *Hatch v. Lusignan,* 117 Wis. 428, 94 N. W. 332, is a case presenting facts very like those in the present case. Other cases illustrative of the rule stated are *Lampman v. Van Alstyne,* 94 Wis. 417, 429, 69 N. W. 171; *Nelson v. Jacobs,* 99 Wis. 547, 75 N. W. 406; *McCann v. Welch,* 106 Wis. 142, 147, 81 N. W. 996; *Ill. S. Co. v. Budzisz, post,* p. 281, 119 N. W. 935, and numerous other

cases cited in the opinion in the last-named case. There can be no doubt that the administrator's deed involved in this case conveyed color of title. *Whittlesey v. Hoppenyan,* 72 Wis. 140, 39 N. W. 355; *McCann v. Welch, supra,* and cases cited; *Ill. S. Co. v. Budzisz, supra,* and cases cited. It was admitted in the record in this case that the defendant *August Salzman* went into possession of the premises in 1879 under the deed from the administrator and that he has remained in possession ever since, claiming adversely to all the world.

This action being one brought to set aside an administrator's deed, it might well be governed by sec. 3918, Stats. (1898), which limits the time within which an action may be brought to recover real estate sold by an administrator to five years after the sale, and provides in the case of minors that the action may be brought within five years after they become of age. But the action was not brought within the time prescribed in this statute and the plaintiffs are barred thereunder. *Betts v. Shotton,* 27 Wis. 667, 669; *Jones v. Billstein,* 28 Wis. 221.

The circuit court, while holding that the right of action to recover the real estate was not barred, also held that if plaintiffs were precluded from reclaiming the property they might still compel an accounting, and that such a right of action was saved by subd. 7, sec. 4222, Stats. (1898), the fraud not having been discovered until 1905. Treating the complaint as being broad enough to entitle the plaintiffs to an accounting, we still think that no right to an accounting exists. The effect of the statutes of limitation referred to is not only to preclude recovery of title by the plaintiffs, but also to vest title in the defendants. *Nelson v. Jacobs, supra; McCann v. Welch, supra.* Title by adverse possession under the ten-year statute as well as the twenty-year statute may be acquired although there is no element of good faith in the entry or in securing the deed under which entry is made

where the ten-year statute is invoked, provided the essentials required by the statute are found to exist. *Ill. S. Co. v. Budzisz, post,* p. 281, 119 N. W. 935, and cases cited. This being so, it would be anomalous to call for an accounting for the value of the property, where the property itself, though still in the possession of the defendant, could not be recovered. The cases of *McMahon v. McGraw,* 26 Wis. 614, and *O'Dell v. Burnham,* 61 Wis. 562, 21 N. W. 635, are relied upon by plaintiffs' counsel as authority to support a right of action under subd. 7, sec. 4222. In neither of these cases had any statute of limitations barred the plaintiff from recovering the thing fraudulently taken away, to wit, the land, and in each of them the land was the thing sought to be recovered.

The circuit court held that the consideration paid by the defendant for the farm was inadequate and that he should have paid $200 more, and that he should account for this amount with interest. Also that a note given to the administrator for $352.36, payable on demand, should be accounted for with interest. It is conceded that this note was not paid to the administrator. He, however, treats it as cash in his final account, although he never made any attempt to collect it, and reports a balance of $315.97 cash on hand, which has never been accounted for. It is plain that the action brought will not lie against the defendants. The administrator is not before the court. We express no opinion as to his liability to account for the balance which his report showed to be in his hands.

The reporter's minutes are incorporated *in extenso* in the bill of exceptions. The evidence as preserved in the bill of exceptions is printed without any abridgment whatever in the case, in manifest violation of Rule 6 of this court.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to enter judgment dismissing the complaint. No costs will be allowed in this court for printing the case.

FIRST NATIONAL BANK OF SHAWANO, WISCONSIN, Appellant, vs. MILLER, Respondent.

March 30—April 20, 1909.

Bills and notes: Construction: Attorney's fees: Negotiability: Certainty as to amount: Statutory provisions: Negotiable Instrument Law: Notice of dishonor: Time: Sufficiency

1. A provision in a note for "ten per cent. attorney's fees if collected by an attorney, or if suit is brought upon this note," is a promise to pay attorney's fees only on collection by an attorney after dishonor, and the note is a negotiable instrument.
2. In all situations where the Negotiable Instrument Law (ch. 356, Laws of 1899) conflicts with the adjudications of the supreme court, as to instruments made subsequent to its passage the former prevails.
3. Under sec. 1678—34, Stats. (ch. 356, Laws of 1899), notice of dishonor of a negotiable note is too late, where the notice with insufficient postage was deposited in the postoffice after ordinary business hours and the closing of the mail on the business day succeeding dishonor, and was not again sent on with sufficient postage until five days after its return by the postal authorities.

APPEAL from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

Action to recover of an indorser on an instrument of which the following is a copy:

"Shawano, Wis., Feb. 24, 1905. $140.00.

"One year after date for value received I promise to pay John Popp, or order, at the *First National Bank,* one hundred forty dollars, with interest at the rate of 6 per cent. per annum from date until paid and 10 per cent. attorney's fees if collected by attorney, or if suit is brought upon this note. Value received. PAUL ANKER."

Indorsed on back across same:

"John Miller.
"John Popp.
"Without recourse."

The instrument sued on was duly made and delivered so as to take effect according to its tenor, the same being, before

delivery, duly indorsed by defendant. Before maturity the instrument was placed with plaintiff for collection in due course, the cashier being informed, at the time, of defendant's residence. At the time the indorsement was made the payee was informed that the defendant received his mail by rural free delivery and as to the route reaching plaintiff. Independently of that, the payee knew the facts of which he was so informed and the cashier also knew where defendant resided. All mail with postage prepaid deposited in the postoffice before 9:25 a. m. on any week day for persons residing on the particular route was customarily delivered on the same day. The note was dishonored Saturday, February 24, 1906. Notice thereof with one cent postage paid, whereas two cents was required, was deposited in the postoffice the evening of the following Monday. It was immediately placed with plaintiff's mail for return because of the insufficient postage and was received by it, in due course, the following day. On the fifth day thereafter, between 6 and 8 p. m., the notice was again deposited in the postoffice, properly addressed and postage properly paid. Thereafter the paper was, for value, sold and duly indorsed to plaintiff without recourse, and defendant refused payment because he was not properly notified of the dishonor.

On such facts the court decided that the instrument was a negotiable promissory note and that defendant was not liable because notice of dishonor was not properly given. Judgment was rendered accordingly.

For the appellant the cause was submitted on the brief of *Wallrich, Dillett & Larson.*

For the respondent there was a brief by *Eberlein & Eberlein,* and oral argument by *M. J. Eberlein.*

MARSHALL, J. The court is of the opinion that, by the fair meaning of the instrument sued on, payment of attorney's fees was provided for only on collection by an attorney

after dishonor. That would seem to be the case as an original matter, and like clauses in similar instruments have uniformly received that construction, as indicated in cases cited to our attention and others: *Sperry v. Horr,* 32 Iowa, 184; *Shenandoah Nat. Bank v. Marsh,* 89 Iowa, 273, 56 N. W. 458; *Farmers' Nat. Bank v. Sutton Mfg. Co.* 52 Fed. 191.

Such being the case the instrument was negotiable under sec. 1675—2 of the Negotiable Instrument Law (ch. 356, Laws of 1899), providing that "the sum payable is a sum certain . . . although it is to be paid . . . with costs of collection or an attorney's fee, in case payment shall not be made at maturity." That was considerately designed to supersede the judicial rule in *Morgan v. Edwards,* 53 Wis. 599, 11 N. W. 21; *First Nat. Bank v. Larsen,* 60 Wis. 206, 19 N. W. 67; *Peterson v. Stoughton State Bank,* 78 Wis. 113, 47 N. W. 368; *W. W. Kimball Co. v. Mellon,* 80 Wis. 133, 48 N. W. 1100, and similar cases.

In all situations where the Negotiable Instrument Law passed in 1899 conflicts with our adjudications, as to instruments made subsequent to that time the former rules.

When the Negotiable Instrument Law was enacted a conflict of judicial authority on the subject in hand and others existed. In some states a clause similar to that here was held to render the amount payable on the instrument uncertain and to destroy its negotiability. In many other states the obligation as to costs of collection was held to be contingent upon collection after dishonor, to appertain to the remedy for a breach of the primary contract, not to the debt itself, and, therefore, not to render the amount uncertain, militating against negotiability. To supersede the conflict by a general rule the provision of the Negotiable Instrument Statute quoted was incorporated therein.

The law relating to proceedings to fix the liability of an indorser of a promissory note, in case of dishonor by the maker, was different in some states than in others, and for harmony

on that as to the time and manner of giving notice of dishonor to the indorser it was provided by sec. 1678—34 of the Negotiable Instrument Statute that "Where the person giving and the person to receive notice reside in different places, the notice must be given . . . if sent by mail" by depositing it "in the postoffice in time to go by mail the day following the day of dishonor, or, if there be no mail at a convenient hour on that day, by the next mail thereafter." Here notice was not sent till after time for mail on the first secular day after dishonor though there was ample opportunity to do so. The departure time for the mail was between 9 and 10 o'clock of such day. That was certainly a convenient time within the meaning of the statute. No excuse is found in the evidence for not depositing the notice with postage fully paid so as to have reached the respondent by such mail. The deposit on the evening of that day, after ordinary business hours and long after the closing of the mail for such day, as regards the route by which it must have been known the notice would reach respondent, if at all, clearly was too late. If that were not so, failure to prepay the postage so notice would go out by the next mail and failure to remedy the mistake after knowledge thereof for several days thereafter released the indorser beyond any possible question.

By the Court.—Judgment affirmed.

VAN EPS, Respondent, vs. NEWALD and another, Appellants.

March 30—April 20, 1909.

Appeal and error: Proceedings in record: Exceptions: Review of findings: Pleadings: Admissions in answer: Alteration of note: Effect upon mortgage: Rights of parties: Chattel mortgages: Replevin: Evidence.

1. Where the bill of exceptions contains no exceptions to the findings, a contention that there is no evidence to support a particular finding is not tenable.

2. Where a complaint alleged the making of "a certain mortgage," describing it, an answer "admitting" the making of "a certain mortgage" of the same date, and containing no suggestion that it was other than the mortgage described in the complaint, admits the making of such mortgage.
3. Admissions in an answer are presumptively referable and responsive to the allegations of the complaint.
4. In replevin by a chattel mortgagee against the purchaser of the mortgaged property with notice of the mortgage, it is immaterial that the note secured by the mortgage had been altered.
5. In an action to recover chattel mortgaged property, evidence that the mortgage thereon was executed, delivered, and filed, of which defendant had full notice when he purchased the property, establishes plaintiff's right to the property to secure his indebtedness to an amount not greater than that named in the mortgage. The amount of such indebtedness can be proved by parol.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

Action of replevin for certain property under a claim of possession by virtue of a chattel mortgage executed by Etta H. Rogers, from whom the property in question was purchased by defendant, the chattel mortgage being duly filed in the town clerk's office. The making of the mortgage was admitted. The only defense was that the note evidencing the indebtedness and described in the mortgage, which was for $1,085, was altered by the plaintiff, as alleged, without the consent or knowledge of the maker, by changing the amount thereof to $865. The trial court, jury being waived, found that the chattel mortgage and note were first executed as a part of a trade of properties between plaintiff and the mortgagor, which trade before consummation was modified so as to entitle the plaintiff to only $865 instead of the $1,085 first contemplated, and that the note and mortgage were delivered to him by mortgagor's agent as security for that debt, and that she, while not participant in the negotiations, had ratified the transaction by accepting and receiving the proceeds of the trade. The defendants having given bond for the

property, which was less in value than the debt secured, judgment was rendered in favor of the plaintiff for such value, to wit, $700, from which judgment the defendants appeal.

The cause was submitted for the appellants on the brief of *D. G. Classon,* and for the respondent on that of *John Bottensek* and *F. J. Rooney.*

DODGE, J. The first contention is that there was no evidence to support the finding that the chattel mortgage described in the complaint was ever executed or delivered. There is no exception to this or any other finding embodied in the bill of exceptions. Therefore the contention is not tenable. Waiving that obstacle, however, we think the fact is admitted by the pleadings. The complaint alleges the making of "a certain mortgage" dated September 22, 1905, and then describes it. The answer "admits" the making of "a certain mortgage" of the same date and contains no suggestion that it was other than the mortgage described. Admissions in the answer are presumptively referable and responsive to the allegations of the complaint. Defendants cannot admit something which the complaint does not allege. It is clear, therefore, that the admission is of the same mortgage which the complaint describes.

The alteration of the note is of no materiality. This is not an action on the note. It is an action to recover the mortgaged property. It is established that the mortgage thereon was executed, delivered, and filed, of which defendant had full notice when he purchased the property. This established plaintiff's right to the property to secure an indebtedness to an amount not greater than that named in the mortgage. That indebtedness might be proved by parol and was shown to be $865. Upon denial of that right he was entitled to recover the property or its value up to the amount of such indebtedness. The judgment does not exceed such right of recovery.

By the Court.—Judgment affirmed.

KUEHN, Appellant, vs. CITY OF ANTIGO and another, Respondents.

March 30—April 20, 1909.

Taxation: "Growing crops:" Ginseng: Statutes: Construction.

1. Ginseng, a plant the roots of which are the marketable and valuable part and require from seven to fifteen years to mature, is, for the purpose of taxation, real estate and not personalty, and is not within the calls of subd. 11, sec. 1038, Stats. (1898), exempting from taxation, among other articles of personal property, "growing crops."
2. The phrase "growing crops" in subd. 11, sec. 1038, Stats. (1898), is used in a restricted sense, and applies to those annual products of the soil which are commonly treated as personalty.

APPEAL from a judgment of the circuit court for Langlade county: CHAS. M. WEBB, Judge. *Affirmed.*

This is an action to set aside an assessment of plaintiff's real estate, on the ground that the assessment is illegal and void because it includes the value of a crop of ginseng growing on the land, and to restrain the collection, or the attempted collection, of taxes on this land on the alleged excessive assessment. Plaintiff is the owner of three fourths of an acre of land within the limits of the defendant city. On this land plaintiff has buildings, improvements, and a ginseng bed. It is admitted that the assessment of the land and improvements, exclusive of the ginseng thereon, at $625 is fair. The assessment of $4,625 included, besides the assessed value of the bare land and the buildings and improvements, the growing crop of ginseng, which was valued at $4,000. The court considered whether or not the ginseng roots and plants were exempt from taxation in Wisconsin as "growing crops," whether, if taxable, the growing ginseng should be taxed as personal property or as part of the real estate, and the reasonableness of the assessment, and held that the ginseng should be taxed as part of the real property and that it was

not exempt, but that the assessment was excessive to the extent of $3,000. The total assessment was reduced to $1,625. This is an appeal from the judgment on the findings of the court as above set forth.

T. W. Hogan, for the appellant.

For the respondents there was a brief by *Morson & McMahon,* and oral argument by *S. J. McMahon.*

SIEBECKER, J. The facts are not in dispute respecting the reputed qualities of ginseng for medicinal purposes and the general characteristics of the plants. It appears that they consist of roots, with a growth of leaves forming a top to the plant, and that the roots are the marketable and valuable part. The roots require from seven to fifteen years to mature and fit them for the market. The plants yield no annual crop except seeds, which are produced annually after the third year, but have no market value in the present state of the ginseng industry. A growing plant, in view of its characteristics and the long time required for its maturity, is not to be classed with emblements or chattels produced from the soil, as are common grains, vegetables, and similar products which are harvested annually. *Simanek v. Nemetz,* 120 Wis. 42, 97 N. W. 508; *Webster v. Zielly,* 52 Barb. 482. The growing plants are therefore not to be classed as personal property for the purpose of taxation under the statutes prescribing what personal property is to be taxed.

It is contended that the court erred in holding that growing plants, while unsevered from the soil, pertain, for the purpose of taxation, to the realty, and that they are not exempted in the law as a growing crop under subd. 11, sec. 1038, Stats. (1898). The trial court properly restricted its determination under the issues to the question of whether or not a bed of growing ginseng should be exempt from taxation as a growing crop. This question involves interpretation of the provision of the above-mentioned statute. The subdivision ex-

empts a number of articles of personal property. The inclusion of "growing crops" therein suggests that the phrase "growing crops" was used in a restricted sense, and is to be applied to those products of the soil which are commonly treated like personalty, namely, the usual annual crops, such as cereals, maize, vegetables, and the annual products of perennial plants and shrubs. Such use of the term "growing crops" in this exemption law accords with the idea that the product so exempted is in legal contemplation one which in its growing state may be treated as a chattel and as separated from the realty. In legal parlance the term "growing crops" is commonly applied to crops growing in the soil but susceptible of constructive severance from it by the owner's transfer of them as chattels, by the operation of law in cases of estates of decedents, or by levy of an execution. This legal process of constructive severance of growing crops has been restricted to those which are produced or harvested annually and thus converted into a separate and usable article. It seems manifest that it was the legislative purpose to exempt from taxation such growing crops as could by operation of law be constructively severed from the realty in which they were growing and thus be treated in law as chattels and as separated from the realty producing them. We are of opinion that growing ginseng differs greatly from this class of growing crops and is not to be regarded as within the terms of a "growing crop," in the sense in which the term is employed in subd. 11, sec. 1038, Stats. (1898). It must therefore be considered as part of the land, and is to be included in fixing a valuation on the land for the purposes of taxation. 8 Am. & Eng. Ency. of Law (2d ed.) 302 *et seq.; Miller v. County of Kern*, 137 Cal. 516, 70 Pac. 549.

We find that the assessed valuation of the land with the ginseng, found by the circuit court, is abundantly supported by the evidence, and we therefore cannot disturb its finding.

By the Court.—Judgment affirmed.

ROGERS-RUGER COMPANY, Appellant, vs. BOARD OF SCHOOL DIRECTORS OF THE TOWN OF BRULE, Respondent.

March 31—April 20, 1909.

Pleading: Allegations on information and belief: Oral demurrer: Schools and school districts: Meetings: Notice: Proof of failure to notify: Evidence: School boards: Auditing accounts: Issuing orders: Trial: Reception of evidence: Invalid orders.

1. An answer denying upon information and belief that certain school orders mentioned in the complaint were legal orders or created any indebtedness, "but the same were void for the reasons hereinafter stated," and thereafter averring positively the facts upon which such invalidity was predicated, is sufficient as against an oral demurrer.
2. Such answer does not aver the facts pleaded upon information and belief, but pleads that upon those facts the defendant was informed and believed that such orders were not legal orders.
3. The answer "yes" by a member of a board of school directors to the question whether or not there were any meetings of the board which he did not attend because not notified, is an insufficient mode of proving lack of notice.
4. Under secs. 518 to 530, Stats. (1898), the power of the board of school directors under the township system, or the executive committee thereof acting as a board, to create obligations against the district and to audit claims and control the issuing of orders, carries with it the duty to do so where the public interests are concerned.
5. In an action on school orders the burden of proof is upon the defendant to sustain an affirmative defense of invalidity of the meetings at which the orders were authorized, and such defense is not sustained by the offer of a page here and there from the records of meetings of the school board, without further showing that the meetings were in fact irregular, since there may have been audit and allowance of the claims or record of notices or of adjournments on the omitted pages.
6. In the absence of evidence that the president and secretary of a school board were to receive no salary, or what orders covered their salaries, it cannot be said that orders issued to such officers for services are void.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Reversed.*

H. V. Gard, for the appellant, cited, among other authorities, *Carpenter v. Momsen,* 92 Wis. 449, 65 N. W. 1027, 66 N. W. 692; *Peacock v. U. S.* 125 Fed. 583; 1 Ency. Pl. & Pr. 805; 21 Am. & Eng. Ency. of Law (2d ed.) 20; *Brown v. School Directors,* 77 Wis. 27, 45 N. W. 678; secs. 686, 709, 715, Stats. (1898); sec. 2560, Id.; secs. 820, 821, 823, 446, 523, 533, 540, 519, 528, Id.; *Wilder v. Rio Grande Co.* 41 Fed. 512; *Miller v. Jacobs,* 70 Wis. 122, 35 N. W. 324; *State ex rel. Wunderlich v. Kalkofen,* 134 Wis. 74, 113 N. W. 1091.

For the respondent there was a brief by *Grace & Hudnall* and *C. R. Fridley,* and oral argument by *G. B. Hudnall.* Among other references upon the part of the respondent were the following: *Corning v. Meade Co.* 102 Fed. 57; *Perkins Co. v. Graff,* 114 Fed. 441; *Phillips v. Carver,* 99 Wis. 561, 75 N. W. 432; sec. 2668, Stats. (1898); *Pearson v. Neeves,* 92 Wis. 319, 66 N. W. 357; secs. 521, 522, Stats. (1898); *Doyle v. Gill,* 59 Wis. 518, 18 N. W. 517; *Troewert v. Decker,* 51 Wis. 46, 8 N. W. 26; *Gates v. Paul,* 117 Wis. 170, 94 N. W. 55; *Deuster v. Mittag,* 105 Wis. 459, 81 N. W. 643; secs. 2829, 4549, Stats. (1898); *Schierl v. Baumel,* 75 Wis. 69, 43 N. W. 724.

TIMLIN, J. The plaintiff, claiming as assignee of the several payees, brought this action against the defendant to recover on thirty-four school orders aggregating $964.48. It had judgment on nineteen of these orders and it was denied recovery on fifteen orders: seven of them because issued to officers of the school board for services rendered and money expended by them contrary to statute, and four of these seven and eight other orders, making up the fifteen rejected orders, because directed to be issued at invalid meetings of the board of school directors as stated in the conclusions of law of the superior court. Concerning seven orders above referred to, the finding of fact was that six of them were issued to Thomas

Doherty for services rendered by him for said school board at a time when he was the president of the board of school directors, and one of them was issued to Arthur Piefke for livery and railroad fare expended by him while secretary of the board of school directors, and with reference to the twelve orders above mentioned the finding of fact was that they "were directed to be issued at special meetings of said board of school directors held on the dates of their issuance, at which meetings there were present only two members of said board, to wit, said Thomas Doherty and Arthur Piefke, and that no notice of any of said meetings was given, and the third member of said board of school directors, said R. J. Davis, had no notice or knowledge of said meetings, any or either of them." It was also specially found that one of these orders was issued at a special meeting of the board at which only the secretary was present, and that said meeting had not been called and no notice thereof given to said R. J. Davis.

The appellant first contends that its oral demurrer to the answer should have been sustained because the answer denies upon information and belief that the orders were legal orders of the defendant or created any indebtedness, and that this was a defense resting upon record evidence within the possession and knowledge of defendant and therefore not available under a denial based merely upon information and belief. We do not find it necessary to determine the correctness of this as a legal proposition, because we do not construe the answer as resting merely upon information and belief. The averment is:

"The defendant denies upon information and belief that the orders mentioned and described in the complaint were legal orders of said defendant or created any indebtedness of which said orders would be evidence, but the same were void for the reasons hereinafter stated, viz."

Thereafter it is averred positively that the claims for which said orders were issued were not audited or allowed at

any legal meeting of said school board, and that certain orders described in the complaint were issued to Thomas Doherty, president of the school board, in part for services and expenses as such president, and in part for merchandise and supplies sold by him to the board while such president, contrary to the statute, etc. This answer was sufficient as against the oral demurrer, and is not to be construed as averring the facts above referred to upon information and belief, but as pleading that upon such facts the defendant was informed and believed that the orders were not legal orders of the school district. This is something like the ancient form of plea and is sufficient as an answer.

The appellant next presents that the findings of fact in the particulars above noted are not supported by evidence. The evidence offered consisted of the thirty-four school orders and page 266 of the record of the school board, which states that a meeting was held July 8, 1905, at which were present Doherty and Piefke, and a resolution passed to employ an attorney, and the following orders were drawn, giving a list of orders numbered 274 to 291, inclusive, the names of the persons to whom drawn, and the consideration for which each was issued and the amount of each, with a statement, "No further business. Adjourned. A. Piefke, Secretary," followed by the word "Approved." Among the eighteen orders listed are Nos. 276 and 277, issued to Thomas Doherty, and Nos. 276, 277, 286, and 289, found by the court to be invalid because issued at a special meeting of which there was no notice given and only two directors present. There was next offered in evidence page 250 of this record book, containing the minutes of a meeting of the school board held March 1, 1905, present Doherty and Piefke. The record is identical in form with that on page 266, and at this meeting among the list of orders is one of the disallowed orders which appears in both classes of disallowed orders, namely, an order to Piefke for livery hire, etc. The court allowed the plaintiff judgment

for at least one order in this list, namely, No. 144, issued to L. Hansen for "services." Page 253 of the record book was next offered in evidence, containing the minutes of a meeting of the school board on March 29, 1905, present Doherty, Geary, and Piefke, and containing a list of orders drawn, among them some orders which were allowed by the court in its judgment and one order, No. 194, to Thomas Doherty, which was disallowed because issued to a member of the board for services. These minutes are like those of the meeting of July 8, 1905, in form. The defendant next offered in evidence pages 260 and 261 of this book, containing the minutes of a meeting of May 13, 1905, at which were present Doherty, Piefke, and Geary, and which recited: "The following orders were drawn." In the list of orders following is one to Thomas Doherty for services, which was disallowed because issued to a member of the board. Other orders issued at this meeting and in this manner were allowed, the form of minutes the same as heretofore noted. Page 264 of this record, containing the minutes of a meeting of June 13, 1905, present Doherty and Piefke. It is stated that "the following orders were drawn." Among the list of orders is one to Thomas Doherty for services, which was disallowed because issued to a member of the board. Page 265 is the same as the last foregoing, and contains one order to Doherty disallowed. Page 268, the same; page 270, the same. This last refers to a meeting of September 26, 1905. Also pages 271 and 272, upon which is recorded a meeting of October 13, 1905, at which meeting Piefke was present and the same form of entry is followed. At least one of the orders so issued at this meeting was allowed in the judgment. Page 275 contains the record of a meeting of December 8, 1905, present Doherty and Piefke, and was in the same form as the other entries, containing a list of orders, some of which were allowed in the judgment. There was no offer of the record book as a whole, and no other pages were offered than those above indicated,

but there are certain unverified bills or claims offered. Robert J. Davis testified that beginning in July, 1905, the school board consisted of himself, Thomas Doherty, and Arthur Piefke; that he was present at all meetings of the school board which he was notified to attend. Upon being asked if there were any meetings held at which he did not attend because he did not have any notice of the meeting, he answered, "Yes, sir." This is a very unsatisfactory and insufficient mode of proving lack of notice. The clerk then read off the list of orders issued to Thomas Doherty from January 21, 1905, to November 9, 1905, also a list of orders issued to Piefke, and the evidence closed. All this is very incomplete and indefinite, and the burden of proof was on defendant to make good its affirmative defense. There may have been audit and allowance of these bills or records of notices or of adjournments on the omitted pages. We cannot presume there was not.

Under the township system the board of school directors is composed of the clerks of the several subdistricts and the clerks of the joint subdistricts the schoolhouses of which are situated in such town. Sec. 518, Stats. (1898). This board has in its corporate capacity the title, care, and custody of all schoolhouses, sites, furniture, apparatus, and other property of all kinds belonging to the subdistricts of the town, and may control the same in such manner as will best subserve the interests of the schools in their town. Sec. 520. The board is to hold two regular meetings in each year, one on the second Monday in June and the other on the third Monday in March. Sec. 521, Stats. (1898), and ch. 416, Laws of 1901. Special meetings may be called by the secretary, or, in his absence or disability, by the president upon the application of one-third of the members of the board and by notifying each member personally or by leaving a written notice at his place of residence or business five days before the appointed time stating the time, place, and objects of the meeting. Sec. 522. At the first meeting above mentioned they shall elect from their

number a president, a vice-president, and a secretary. Sec. 523. The board may out of funds provided by the town for that purpose purchase or hire sites, houses, and rooms for the use of the school, fence and improve the same, build, enlarge, alter, improve, and repair schoolhouses, outhouses, or other buildings for school purposes, provide suitable water supply, and arrange for the transportation of all pupils who live more than one and one-half miles from the schoolhouse. Sec. 524. This board has supervision and management of all the schoolhouses. Sec. 526. All powers conferred upon district boards excepting those the exercise of which would conflict with the provisions of law relative to the township system are conferred upon the town boards of directors. Sec. 527. The president, vice-president, and secretary of the town board of directors shall constitute an executive committee who shall execute all orders of the board, and for this purpose all power and authority vested in such board shall be deemed vested in the executive committee, and any duty devolving upon the town board shall devolve upon such executive committee. Sec. 528. The secretary is required to record all the proceedings of the board, to keep accurate and specific account of all expenses incurred by the board, including a list of orders drawn by him, with the date, amount, person in whose favor, and object for which each order was issued. Sec. 530. He shall draw orders on the town treasurer for moneys in the hands of such treasurer apportioned to the town and other moneys for the payment of teachers' wages, the purchase of school sites, the building, buying, hiring, repairing, and furnishing of schoolhouses, and for all other lawful purposes, and each order shall designate the object for which and the fund upon which it was drawn and shall be countersigned by the president. He shall make a financial report annually to a committee of the electors at the town meeting. Ch. 160, Laws of 1901.

Under such statutes there cannot be much doubt that the

school board, or the executive committee acting as a board, has the power to create obligations against the district and to audit claims and to control the issuing of the orders or warrants. The power to do this carries with it the duty to do this where the interest of the public is concerned. *Doyle v. Gill,* 59 Wis. 518, 18 N. W. 517.

It may be that the learned trial judge considered that the whole record of the proceedings of this board was in evidence, but that is not the case that is presented here. Certain pages of the record book are offered in evidence, and these pages show a list of orders drawn at a meeting at which only the president and secretary of the board were present. The meetings which are in evidence are not stated to be special meetings. To presume that these are special meetings is to presume irregularity. There is a suspicion not amounting to proof that the demands in payment for which the rejected orders were drawn were not audited and allowed by the board, but the bill of exceptions is said to contain all the evidence, and it contains no evidence to establish such fact.

With reference to the orders issued to the president and secretary of the board, many of them are probably void, but we cannot say which are void. By ch. 160, Laws of 1901, the secretary might lawfully have orders due to him for salary amounting to $75 in a school year and the president might have orders in the same time amounting to $30. The school year began on the 1st day of July. Sec. 525, Stats. (1898). These salaries are to be audited at the annual meeting thereafter. When such audit took place, if at all, what orders covered these salaries, or whether there were any salaries, is not shown.

On the whole, it seems that the only proper disposition of this case as the record is presented to us is to reverse the judgment and remand the cause for a new trial, and so enable the parties to present all the evidence bearing upon the legality or illegality of these school district orders.

By the Court.—It is so ordered.

ROGERS and others, Appellants, vs. BOARD OF SCHOOL DIRECTORS OF THE TOWN OF BRULE, Respondent.

March 31—April 20, 1909.

Schools and school districts: Orders: Validity: Burden of proof.

In an action on orders of a board of school directors the defendant has the burden of proof on the issue of their invalidity.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Reversed.*

H. V. Gard, for the appellants.

For the respondent there was a brief by *Grace & Hudnall* and *C. R. Fridley,* and oral argument by *G. B. Hudnall.*

TIMLIN, J. The same question of pleading is presented as was relied upon in *Rogers-Ruger Co. v. School Directors, ante,* p. 135, 120 N. W. 849. The bill of exceptions in this case appears to be a copy of the bill in that case. The court found as a fact "that said described orders were directed to be issued at special meetings of the said board of school directors held on the respective dates upon which the orders were issued, at which meetings there were present only two members of said board, to wit, Thomas Doherty and Arthur Piefke, and that no notice of any of said meetings was given, and the third member of said board of directors had no notice or knowledge of said meetings or any or either of them." From this the court concluded that all the orders were invalid and constituted no indebtedness. The bill of exceptions is certified to contain all the evidence, but it contains no evidence bearing upon the fourth or fifth findings of fact, and neither of these findings is conclusive upon the defendant's liability or nonliability. The levy of $3,000 for a new schoolhouse might or might not authorize the purchase of a site, depending upon the proper construction of the resolution, and affected, it may be, by proof *dehors* the record of facts and cir-

cumstances. The site might have been lawfully purchased out of other funds under the charge of the board. All this is the subject of proof, and the party alleging invalidity must show it.

For the further reasons given in Rogers-Ruger Company against the same defendant and decided herewith (*ante*, p. 135), the judgment of the superior court must be reversed and the cause remanded for a new trial.

By the Court.—It is so ordered.

RUGER, Appellant, vs. BOARD OF SCHOOL DIRECTORS OF THE TOWN OF BRULE, Respondent.

March 31—April 20, 1909.

Rogers-Ruger Co. v. School Directors, ante, p. 135, followed.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Reversed.*

H. V. Gard, for the appellant.

For the respondent there was a brief by *Grace & Hudnall* and *C. R. Fridley*, and oral argument by *G. B. Hudnall.*

TIMLIN, J. This appeal presents the same questions of law determined in *Rogers-Ruger Co. v. School Directors, ante*, p. 135, 120 N. W. 849.

The judgment should therefore be reversed, and the cause remanded for a new trial.

By the Court.—It is so ordered.

JOHNSON and others, Respondents, vs. VICKERS, Appellant.

March 31—April 20, 1909.

Assignments: Contracts assignable: Action by assignee: Evidence: Issues: Pleading: General denial: Defects in pleading: Waiver: Demurrer: Estoppel.

1. A contract with individual subscribers inexperienced in the business, for the erection and equipping of a canning factory according to specifications, which requires skill and experience and imposes liability upon the contractor, involves a relation of personal confidence, and is not assignable by the contractor without the consent of the individual subscribers.
2. In an action by the assignees of a contract, a valid assignment of the contract is a necessary allegation of the complaint, is put in issue by a general denial, and, unless such allegation is supported by proof, the assignee cannot recover.
3. In an action by the assignees of a contract, failure to plead a valid assignment is failure to state a cause of action, and such defect is not waived by failure to demur.
4. In the absence of evidence which would establish consent, ratification, or estoppel, the assignees of a nonassignable contract cannot recover from the other party.

APPEAL from a judgment of the circuit court for Barron county: A. J. VINJE, Circuit Judge. *Reversed.*

The action was brought to recover a sum alleged to be due on a subscription contract. At the close of the testimony the court directed a verdict in plaintiff's favor, and from a judgment entered on such verdict this appeal is taken.

During the fall of 1906 certain parties circulated four subscription papers, alike in tenor and effect, which by their terms would constitute a single contract when completed. The purpose was to secure subscriptions to the amount of $14,000 to build a canning factory at Chetek, Wisconsin. The Industrial Construction Company, a Chicago corporation, was the first party to the proposed agreement, and the subscribers were to become the second parties. The first party agreed to erect and equip the canning factory, accord-

ing to specifications attached to the proposed contract, for $14,000. No subscriber was required to pay until the factory was completed, and the contract was to have no force or effect until $14,000 was subscribed. After the requisite subscriptions were obtained the second parties agreed to appoint an executive committee of three with full power to represent them in all their interests, and to inspect the work, materials, and machinery from time to time as the factory was being built and equipped. All subscriptions were to become payable when the factory was completed, but in certain cases it was provided that notes might be given. After the factory was in operation it was agreed that the second parties should form a corporation, each subscriber to receive stock to the amount of his subscription. The specifications for the building to be erected and the kind and character of the machinery to be furnished appear to be quite complete as to details, and such specifications were made a part of the contract. The contract bears date December 4, 1906, and the list of names attached thereto shows subscriptions to the amount of $14,000.

A meeting of the subscribers was called for December 6th at Chetek by mailing postal cards on the 4th and 5th of the month. The subscribers to the number of 175 were scattered throughout Barron county. The defendant was a subscriber to the amount of $100. He did not receive notice of the meeting until after it had been held. Some fifty or sixty subscribers, less than a majority, were present. At this meeting an executive committee was appointed. On December 8th the Industrial Construction Company assigned the contract in question, without recourse, to *Rasmus Johnson, Christ Johnson,* and *T. H. Pardoe,* the plaintiffs in this action. The assignees proceeded to erect the factory. Several meetings of the subscribers appear to have been held from time to time, none of which defendant attended except a meeting held on March 2, 1907, at which time a vote was taken on

the proposition of accepting the factory, and upon which proposition defendant claims to have voted in the negative. The subscribers were not advised of the alleged assignment of the contract to the plaintiffs before it is claimed that the job was accepted by the executive committee. It is conceded that the plant was not completed in some particulars on March 7th. The building had not been painted and cement floors had not been put in the boiler and engine room, and some other things remained to be done. The executive committee reported that the painting was not done and the cement floor was not put in by March 7th because it requested that this work be postponed until warm weather, and that it had made arrangements for doing the work at the proper time; and further, that it had consented to some slight modifications in the contract, and that the same was completed by March 7th, except as to painting and cement work, which had been arranged for. Defendant declined to pay his subscription, and on the following grounds defended an action brought to recover the same: (1) The contract was not assignable. (2) The factory was not completed when accepted. (3) The requisite $14,000 had not been subscribed.

Failure to sustain these defenses is alleged as error, and error in rulings on evidence is also assigned.

For the appellant there was a brief by *Bundy & Wilcox,* and oral argument by *R. P. Wilcox.*

For the respondents there was a brief by *A. J. Sutherland* and *J. W. Soderberg,* and oral argument by *Mr. Sutherland.*

Barnes, J. The disposition of this appeal necessitates the consideration of the following questions: (1) Was the contract sued on assignable? (2) Was the question of its nonassignability raised by the pleadings? (3) Was the defendant precluded from insisting upon the defense of nonassignability?

1. It is established that the Industrial Construction Com-

pany attempted to make an absolute assignment of its contract two days after its execution and before any work was done thereunder. The assignment is unqualified in its terms and is made without recourse, and the plaintiffs are suing as assignees claiming to have performed the work and furnished the materials used in the construction of the factory by virtue of the assignment and not as subcontractors. This contract obligated the Industrial Construction Company to build and equip a canning factory according to specifications attached to the contract that seem to be complete as to details. The performance of the work undoubtedly required skill and experience, and upon its proper execution the success of the enterprise might well depend. The assignees were wholly inexperienced in constructing plants of this character, while the assignor apparently followed the business of so doing. This contract manifestly imposed a liability upon the assignor of the plaintiffs, and involved a relation of personal confidence which the subscribers must have intended would be exercised by the party in whom they confided. In the construction of a complex plant, subscribers having no knowledge themselves as to how such a plant should be constructed would naturally prefer to make their contract with a party having the requisite knowledge and experience rather than with persons having neither. Good business judgment would dictate that such a course should be pursued. They had the right to select the party with whom they would deal, and, when the selection was made and the contract was executed, there could be no substitution of contractors in the case before us without the assent of the subscribers. The authorities are quite uniform in holding that such a contract is not assignable by the contractor without the consent of the other party thereto. *Ark. Valley S. Co. v. Belden M. Co.* 127 U. S. 379, 387, 8 Sup. Ct. 1308; *Boston Ice Co. v. Potter,* 123 Mass. 28; *Swarts v. Narragansett E. L. Co.* 26 R. I. 388, 59 Atl. 77; *Campbell v. Sumner Co.* 64 Kan. 376, 67 Pac. 866; *Edison*

v. Babka, 111 Mich. 235, 69 N. W. 499; *Winchester v. Davis P. Co.* 67 Fed. 45; *Worden v. C. & N. W. R. Co.* 82 Iowa, 735, 48 N. W. 71; *Craig v. Miller,* 6 Ky. 440; 4 Cyc. 22, 23.

2. It is urged that the question of assignment is not before the court because it is not put in issue by the pleadings. The complaint alleged the assignment of the contract sued upon. This was a necessary allegation because the plaintiffs depended on such assignment for their right to recover. The answer put this allegation in issue by a general denial. Since the plaintiffs relied upon the fact of assignment to prove any cause of action at all, the general denial put the averment of assignment in issue.

"The general rule under the Code is that any matter of fact alleged in the complaint which the plaintiff must establish to make out his cause of action may be disproved under a general denial." *Hilliard v. Wis. L. Ins. Co.* 137 Wis. 208, 117 N. W. 999, 1000, and cases cited.

It was incumbent upon the plaintiffs to prove a valid assignment in order to show that they had a cause of action, unless the assignment was admitted, which it was not. Their proof failed to show that they had a cause of action, because no valid assignment was shown. If it be claimed that the complaint itself failed to show a valid assignment and therefore did not state a cause of action, such defect is not waived by failure to demur. Sec. 2654, Stats. (1898).

3. No facts were shown which would establish a ratification of the assignment by the defendant or an estoppel which would preclude him from denying liability. The defendant did not know that the contract had been assigned until after the plaintiffs claimed that the work had been completed and had secured a certificate from the executive committee to that effect. Neither did the other subscribers generally know of such assignment, and what evidence there is on the subject tends to show that even the executive committee did not know

of the assignment until the certificate to the effect that the contract had been completed was given. Were this otherwise, the result would not be different. The authority given by the contract to the committee was not broad enough to empower it to make a substitution of parties thereto. Its powers do not seem to have been enlarged by the subscribers at any of the meetings held. It might be an interesting question whether such power could be conferred except by all parties in interest, but there does not appear to have been any attempt to confer it. Indeed, the right of the executive committee to act at all is, to say the least, doubtful. It was chosen by a minority of the shareholders at a meeting called under such circumstances that many of the subscribers were debarred from attending it by reason of the short time that elapsed between the date of the meeting and the mailing of the notice announcing it. The question, however, is not material to a disposition of the appeal.

It is unnecessary to consider other errors discussed.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to set aside the order directing a verdict in plaintiffs' favor, and to grant the defendant's motion for a directed verdict in his favor, and for judgment dismissing the complaint.

BIERI, Respondent, vs. FONGER, Appellant.

March 31—April 20, 1909.

Trespass: Possession by wife: Entering dwelling house: Pleading: Sufficiency of complaint: Amendment to conform to proof: Presumption of amendment on appeal.

1. The entry by a person into the home of husband and wife for an unlawful purpose without the wife's consent, she being by reason of the absence of her husband exclusively in possession of the premises, is a trespass to realty—a violation of the wife's possession.

2. If facts stated in a complaint constitute a good cause of action, though not the one the pleader intended, the pleading is good as against a general demurrer.
3. In testing a complaint for sufficiency the question is not whether it states the cause of action the pleader had in mind, or states the facts essential to a cause of action with technical accuracy and certainty, but is whether, giving the pleading the benefit of every reasonable inference, it expressly or by such inference, or both, states a good cause of action.
4. If a good cause of action is established on the trial and all controversies in reference to the matter are fully tried without objection, and such cause is within the jurisdiction of the court and might have been but was not fully pleaded, or was not the particular cause of action the pleader had in mind at the outset, though the facts are fairly stated, the complaint may be amended to conform to the proof, either before or after verdict, saving the substantial rights of the adverse party.
5. In such situation, if necessary to sustain the judgment, the complaint will, on appeal, be deemed amended according to the judgment.
6. Where a complaint states a cause of action for an assault and battery, and in addition states, defectively, a cause of action for trespass to realty but in a manner indicating that a cause of action of that character was in the pleader's mind, the complaint is good on demurrer because of the facts stated constituting the cause of action for assault and battery.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

Action to recover on facts stated, as follows:

First. Plaintiff has been, for nine years, a married woman, living with her husband.

Second. August 2, 1906, defendant "unlawfully and wrongfully went upon the premises occupied by plaintiff, and then and there, unlawfully and wrongfully, solicited criminal conversation with plaintiff, and then and there, unlawfully and wrongfully, assaulted and beat her, whereby the plaintiff was put in great fear and caused to suffer great pain, suffering, and torture of body and mind;" to her damage in the sum of $5,000.

The answer put all material allegations of the complaint in issue.

There was evidence tending to prove that, at the time alleged, plaintiff was a married woman living with her husband, who was temporarily away from home; that defendant entered upon the premises occupied by plaintiff and her husband for the unlawful purpose of soliciting and obtaining carnal knowledge of the body of plaintiff, and, to that end, that he made indecent proposals to her, pressed her to drink whisky with him, and laid violent hands upon her for his unlawful purpose, and desisted only after having been several times struck by the plaintiff with a stove poker; that she was pregnant at the time and suffered much disturbance of mind for a long time after the event as a result thereof.

The cause was submitted to the jury as an action for assault and battery, resulting in a verdict in plaintiff's favor for $900. Several days after the close of the trial, but during the trial term, defendant, by his counsel, excepted to that portion of the charge submitting the case for damages in favor of plaintiff in case they found the assault alleged was committed, without reference to whether the alleged trespass to the premises occupied by her occurred or not.

A motion for a new trial was made based, among other things, on the exception aforesaid and that the verdict was excessive. Judgment was rendered for plaintiff upon the verdict and defendant's motion denied.

For the appellant there were briefs by *Luse, Powell & Luse,* and oral argument by *L. K. Luse.*

W. P. Crawford, for the respondent.

MARSHALL, J. The claim of appellant that the cause of action set forth in the complaint was for trespass to real estate; that the allegations to the effect that appellant was guilty of physically violating the person of respondent, laying himself liable to a civil action for assault and battery, were stated as aggravating characteristics of such trespass,

and that there was no proof of the latter trespass, hence was a failure of proof entitling appellant to a dismissal of the case,—cannot be approved for the following two reasons:

Conceding for the moment that the pleader purposed declaring in trespass to realty, the proof was undisputed that, if the assault and battery alleged to have occurred happened, there was a violation of respondent's possession of the premises when the deed was perpetrated. The situation is thus ruled by *Ford v. Schliessman,* 107 Wis. 479, 83 N. W. 761, where it was held, in effect, that entry by a person to the home of husband and wife for an unlawful purpose without her consent, she being by reason of absence of her husband exclusively in possession of the premises, is a trespass to realty, a violation of the wife's possession.

In view of the foregoing the finding of the jury that respondent told the truth as to appellant's conduct, in effect, found that he committed the trespass which is now claimed was the real gravamen of the cause of action set forth in the complaint.

Aside from the foregoing it is considered respondent made out a cause of action disclosed by the complaint. It is not the law, under our liberal rules of pleading and the statutory rule that the court will, "in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect," that, in all circumstances, a recovery consistent with the evidence and facts pleaded, but not with the cause of action the pleader had in mind in drafting his complaint, can be successfully challenged after verdict. If facts are stated constituting a good cause of action, though not the one the pleader intended, the pleading is good as against a general demurrer. *Morse v. Gilman,* 16 Wis. 504; *Swift v. James,* 50 Wis. 540, 7 N. W. 656; *Manning v. School Dist.* 124 Wis. 84, 102 N. W. 356; *Franey v. Warner,* 96 Wis. 222, 227, 71 N. W. 81; *Emerson v. Nash,* 124 Wis.

369, 102 N. W. 921. Under these authorities, and many more that might be referred to, in testing a complaint for sufficiency the question is not whether it states the cause of action the pleader had in mind, or states the facts essential to a cause of action with technical accuracy and certainty, but is, as said in the initial case, whether, giving the pleading the benefit of every reasonable inference, it expressly or by such inference, or both, states a good cause of action.

In harmony with the foregoing rule, if a good cause of action is established upon a trial and all controversies in reference to the matter are fully tried without objection and such cause is within the jurisdiction of the court and might have been but was not fully pleaded or was not the particular cause of action the pleader had in mind at the outset, though the facts are fairly stated, the complaint may be amended to correspond with the cause proved either before or after verdict, saving the substantial rights of the adverse party or, if need be to sustain the judgment, it will, on appeal, be deemed amended in accordance with the judgment. *Hopkins v. C., M. & St. P. R. Co.* 128 Wis. 403, 107 N. W. 330; *Kleimenhagen v. Dixon,* 122 Wis. 526, 100 N. W. 826; *McKinney v. Jones,* 55 Wis. 39, 11 N. W. 606, 12 N. W. 381. This has been declared so many times that it has become quite elementary. The fact is that there is little room, if any, for mere technicalities in our system of jurisprudence. It deals with rights and remedies for the sole purpose of the attainment of justice, not for the purpose of dignifying into a controlling feature any of the numerous little inconsequential defects that may arise in the course of litigation, not seasonably mentioned by the adverse party, or, if mentioned, not affecting him substantially in any aspect of the matter. Here all facts were stated essential to a cause of action for damages for assault and battery. If the pleader had, in addition, stated, defectively, a cause of action for trespass to real estate but in a manner indicating that a cause of action of that character was in mind, the complaint would have been held good

on demurrer because of facts stated constituting the cause of action for assault and battery, as was the case in *Swift v. James, supra.*

This is very unlike *Joseph Dessert L. Co. v. Wadleigh,* 103 Wis. 318, 79 N. W. 237, where the sufficiency of the proof to make out the cause of action which plaintiff relied on was raised by a motion for a nonsuit and no request was made for leave to amend the complaint according to the proof of facts stated therein constituting a different cause of action than the one the pleader had in mind.

In the light of the very liberal rules for testing the sufficiency of pleadings and proceedings which have been declared in recent years and the progressive tendency to broaden the judicial vision as to the scope of sec. 2829, Stats. (1898), aforesaid, the criticism in *Joseph Dessert L. Co. v. Wadleigh, supra,* would hardly be made today. The general spirit of the decision as regards essentiality of technical accuracy in pleadings and necessity for a party to stand or fall, under all circumstances, by the particular cause of action he intended to plead, is not in strict harmony with the later-day expressions and decisions. This does not impair the decision of that case but only softens somewhat the logic of the discussion. If there, upon the motion for a nonsuit, the complaint had been amended in accordance with the evidence, saving the defendant from prejudice, if necessary, by proper terms, the ruling might have been sustained, or had the sufficiency of the case made by the evidence not been challenged till after verdict, as in this case, the variance would, doubtless, have been regarded as nonprejudicial, if the issues underlying the recovery were fully tried, or there was full opportunity for the adverse party to try them.

The claim made that the damages found by the jury are excessive has been examined without discovering any warrant for disturbing the result.

By the Court.—Judgment affirmed.

LEMMA, Respondent, vs. BLANDING, Appellant.

March 31—April 20, 1909.

Appeal and error: Review: Findings, when disturbed: Evidence: Documentary evidence: Books of account: Time of making entries: Partnership contracts: Construction: Accounting: Interest: Affirmance or reversal: Correction of errors.

1. Where the correctness of an account between the parties as stated by the referee and lower court is sustained by the evidence, it will not be disturbed on appeal.
2. The making of entries in books of account whenever reported as paid or received is a substantial compliance with the rule that they should be made at the time of the transaction to make the books competent evidence.
3. In a contract by which one partner agreed to secure logs at a cost not exceeding $7 per thousand and to manufacture and pile the lumber at an additional cost of not more than $4 per thousand, said amounts were not mere estimates, but the partner assumed thereby an obligation to furnish the lumber in pile at a cost not exceeding $11 per thousand and to pay personally any excess over such cost.
4. When statements and accounts of a partnership upon which the partnership had to be closed and settled are in one partner's possession, and at no time was the other partner informed of the actual amount due from him, except under special circumstances interest is not to be allowed on the amount so due prior to the commencement of the action for an accounting.
5. Error based on mere computation of interest can be corrected by the supreme court, and the judgment, modified so as to correct the error, will be affirmed.

APPEAL from a judgment of the circuit court for Polk county: A. J. VINJE, Circuit Judge. *Modified and affirmed.*

For the appellant there was a brief by *Kennedy & Yates,* and oral argument by *W. T. Kennedy.*

For the respondent there was a brief by *Clarence C. Coe & Arthur E. Coe,* and oral argument by *Clarence C. Coe.*

SIEBECKER, J. This is an action for an accounting, growing out of an agreement in writing which provided

for acquiring a stock of oak logs and timber, manufacturing them into lumber, paying therefor, selling the lumber, and dividing the profits. Plaintiff agreed to advance money for the purchase of the logs and for paying for the work of sawing and piling the lumber in the yard of the defendant. The logs were not to cost more than $7 per M feet. The defendant agreed to give his time and attention free of charge, to look after the buying and scaling of the logs and timber, and to arrange for sawing and piling the lumber, all at a cost of not to exceed $4 per M feet, the total cost of the lumber in the pile not to exceed $11 per M feet. Plaintiff agreed to furnish money without interest for the purposes above specified and also the money to procure insurance, to pay the taxes, and to pay for hauling the lumber to the track during the following winter. He also agreed to market the lumber to the best advantage and to collect all the money to become due therefor, and, after deducting the sums advanced by him, to divide the balance equally between the parties.

It is averred that the defendant furnished the plaintiff 177,539 feet of lumber for selling; that plaintiff furnished $5,074.28 for material and expenses; that the receipts from the sale of the lumber have not been sufficient to reimburse plaintiff for his expenditures; and that defendant refuses to render an account of the transaction. The defendant claims that he has furnished the plaintiff with 290,000 feet of lumber under the contract, that the value thereof is in excess of any expenditures made by the plaintiff, and that he has advanced $400 more for making purchases of logs than he has received from the plaintiff.

The established facts are that the defendant kept no books of account and that he carried on other lumber transactions at the same time he was performing his contract with the plaintiff. Evidence was introduced in his behalf that the lumber belonging to these different deals was kept separate, and that, when the piling had been completed, estimates made

by him and a scaler employed by him showed over 280,000 feet of lumber as having been acquired, sawed, and piled by him under his agreement with the plaintiff. He testified that this lumber had all been turned over to the plaintiff except about 6,000 feet of mill culls that had been seized and sold for taxes; that plaintiff had hauled a large quantity away by wagon and had not loaded it upon cars to be shipped and sold; and that he had expended for the purchase of logs more than the amount of money he had received from the plaintiff.

The money received by the defendant from the plaintiff, as well as money received by the defendant in connection with another transaction, was placed in the hands of a merchant and paid out by him on orders from the defendant. These different sums of money were not separated or kept distinct by the defendant. Plaintiff purchased and paid for directly 3,988 feet of logs. The books and papers of the plaintiff, which were introduced in evidence, showed that the plaintiff had advanced under the contract a total of $5,074.28, and that he had shipped and sold 182,153 feet of lumber.

The referee made the records furnished by the plaintiff the basis of his report. He allowed the defendant $11 per M feet on the amount of lumber sold by the plaintiff, less the 3,988 feet which plaintiff had paid for directly, and credited plaintiff with the amounts advanced for the purchase of logs by the defendant, the amounts paid out for scaling, sawing, and piling, the amounts paid for hauling, shipping, etc., subsequent to the piling, and the amount paid directly by him for logs. The 6,000 feet of culls which were sold for taxes were not considered in the referee's account. The report allowed the plaintiff as his share of the profits one half of the difference between the amount received by him from sales and the sum obtained by adding the cost of hauling, shipping, etc., subsequent to the piling, to the amount obtained by multiplying the number of thousands of feet credited to defendant against the plaintiff by $11, the contract price per M feet in the pile.

The court modified the report of the referee by crediting defendant with 6,000 feet of lumber, evidently the amount seized and sold for taxes. An examination of the record confirms the correctness of the account as stated by the court. The claim that the plaintiff received from the defendant more than 188,153 feet of lumber as found by the court is not borne out by the evidence. True, there is some evidence indicating that defendant delivered more than this amount of lumber to the plaintiff, but this is explained by the inclusion of unmarketable culls, indefiniteness as to the quantity delivered, and the definiteness of the quantity actually shown by the sales, which was based on competent and credible evidence. Under these circumstances we cannot disturb the conclusion of the court and referee on this issue. The facts and circumstances fully sustain the finding, and a detailed statement of the evidence is not necessary here.

An exception is urged to the reception of plaintiff's account books in evidence. The entries were shown to have been made under circumstances that made them evidence of their contents. The fact that the entries were made whenever reported as paid or received is substantial compliance with the requirements for making them competent evidence. Nor is there anything before the court of any substantial nature showing inaccuracies or errors in the book entries. The plaintiff laid a sufficient foundation to have the books received in evidence.

It is contended that the court erred in construing the contract of the parties to the effect that the defendant undertook the purchase of logs, the scaling of the timber, and to saw and pile the lumber at the cost of not to exceed $11 per M feet. The contract specified in one article that the plaintiff was to furnish what money would be required to purchase the "oak timber and logs at a cost not to exceed $7 per M feet," and in another article that the defendant was to do the buying, scaling, and arrange for sawing and piling the lumber "at a cost not to exceed $4 per M feet," and that the "total cost of lumber in pile not to exceed $11 per M feet." It is evident

from these provisions that defendant undertook to secure the logs and timber at a cost not exceeding $7 per M feet and to manufacture and pile the lumber at an additional cost of not more than $4 per M feet. From this it results, as the court held, that he assumed to furnish the lumber in pile in the yard at a cost of not more than $11 per M feet. If, then, the cost exceeded this sum, defendant personally assumed to pay the excess. This amounts to an assumption by him of this obligation, and precludes interpreting the contract to the effect that these stipulated amounts of cost were only estimates, and left the actual cost, if above these amounts, to be borne by both parties.

We find no support in the evidence for the claim that the parties subsequently modified the agreement to the effect that the plaintiff was to share payment of the cost above the stipulated price. The contract thus made and existing between the parties negatives any claim that the defendant had a right to be credited or reimbursed the $400 he furnished for the purchase and manufacture of this lumber. This item was properly excluded from the account stated under the contract.

The court charged the defendant with interest on the sum found due the plaintiff from the defendant on this transaction from May 1, 1901. The provision regarding interest is somewhat obscure. It is that the plaintiff "makes no charge of interest." Whether this referred to the final settlement or to the time when the lumber had been marketed by the plaintiff is not clear. We find, however, that the statements and accounts upon which the transaction had to be closed and settled were in plaintiff's possession, and that at no time was the defendant informed of them or in possession of information of the actual amount due from him to the plaintiff. Under these circumstances "the true rule that, except in special circumstances, interest is not to be allowed upon partnership accounts as between partners until the final bal-

ance is stated, in the absence of an agreement between the parties to the contrary," is applicable. There is nothing shown by the evidence to take the case out of this rule. *Hart v. Hart,* 117 Wis. 639, and cases cited at page 663 (94 N. W. 890). Plaintiff should be allowed interest on the amount found due from the date of the commencement of the action to the date of the judgment. Since the error is one based on the computation of interest, it can be corrected by this court and the judgment be so modified as to correct the error.

By the Court.—The judgment awarding recovery in the sum of $1,950.09 is modified by reducing the interest to be recovered to $216.08. This, when added to the principal, amounts to $1,610.17, for which judgment is awarded. As so modified the judgment is affirmed, appellant to recover costs on this appeal.

LUNDBERG and others, Appellants, vs. EASTERN RAILWAY COMPANY OF MINNESOTA, Respondent.

March 31—April 20, 1909.

Eminent domain: Invalid condemnation proceedings: Injunction before entry: Dissolution: Appeal and error: Prejudicial error.

Where a railroad company, acting under an invalid proceeding to condemn land for a right of way, had made no entry nor erected any structure on the land, but threatened to enter and construct a track, the owner is entitled to an injunction restraining the company from entering the land without first making compensation, and it is therefore error to dissolve a temporary restraining order on condition that the company secure the owner for the damages resulting from the entry and construction of the road. *McCord v. Eastern R. Co.* 136 Wis. 254, followed.

APPEAL from an order of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

Action to enjoin defendant from threatened entry upon certain land of the plaintiffs and construction of a railroad grade and track thereon. The defendant was proceeding under the same invalid condemnation proceedings treated in *Eastern R. Co. v. McCord,* 136 Wis. 249, 116 N. W. 841, and *McCord v. Eastern R. Co.* 136 Wis. 254, 116 N. W. 845. A temporary restraining order was granted, but, upon order to show cause, was on October 12, 1907, vacated on condition that defendant give bond in an adequate sum for all damages resulting from entry and construction of the road; the date of the order varying but seven days from the date of the order considered in the *McCord Case.* From such order of vacation the plaintiffs appeal.

For the appellants there was a brief by *J. B. Arnold* and *E. A. Arnold,* and oral argument by *L. K. Luse.*

For the respondent the cause was submitted on the brief of *J. A. Murphy.*

DODGE, J. The only distinction between plaintiffs' situation and that in *McCord v. Eastern R. Co.* 136 Wis. 254, 116 N. W. 845, is that at the time of the commencement of the suit defendant had as yet made no entry and erected no structure upon the plaintiffs' land. There could, therefore, be no question of the waiver or loss of plaintiffs' right to object which might result from even tacit acquiescence in the occupation of their premises by the railroad. All the reasons which led to the conclusion in the *McCord Case* apply here and must control the result.

By the Court.—Order appealed from is reversed, and cause remanded for further proceedings according to law.

PETITION OF HAYES.

April 1—April 20, 1909.

Municipal corporations: Courts: Jurisdiction: Vacating streets.

1. **Whether or not the legislature can confer upon courts power to vacate public highways,—a point not considered,—no such power has been attempted to be conferred under the statutes of this state.**
2. **Secs. 2265, 2266, Stats. (1898), simply authorize the vacation of plats or parts of plats and do not purport to authorize the vacation of streets or to interfere with or divest rights acquired under a plat by the public or by private parties.**
3. **The vacation of streets of a city is vested exclusively in the common council, and hence in an original proceeding to vacate a part of a city street the circuit court is without jurisdiction and the proceeding should be dismissed.**
4. **Nothing in the foregoing is intended to deny the circuit court power to vacate streets which merely appear in the plat but have not been accepted.**

APPEAL from an order of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

The plaintiff, *Hiram Hayes,* filed his petition in the circuit court for Douglas county, setting up, among other things, a description of the property in Hayes's Addition to West Superior, and that, being the owner and proprietor of the land described in said addition, he caused the same to be surveyed and platted as Hayes's Addition to West Superior, and duly filed in the office of the register of deeds of the county of Douglas on the 30th day of August, 1890, such plat and caused the same to be recorded; that in platting the land described the petitioner dedicated streets, avenues, and alleys full three eighths of the whole piece, giving thereto or providing therefor Lamborn avenue or Grand avenue, North Third and North Fourth streets each seventy feet wide, and making alleys twenty feet wide as shown upon the plat; that petitioner is the owner of several lots, describing them, on

Lamborn avenue; that afterwards a portion of Lamborn avenue was widened by the common council of the city of Superior from seventy feet to one hundred feet by taking fifteen feet from the lots on each side of Lamborn avenue; that the street was widened against the protest of the petitioner. The petition further alleges:

"That said Lamborn avenue is a street paved sixty feet in width, from curb to curb, between North Third street and Belknap street, with a space of twenty (20) feet wide allowed on either side of the avenue for sidewalks. That the purpose of this application to the court is to obtain its allowance of the application to alter the plat of said Hayes's addition so as to take eight (8) feet in width off from the east side of said avenue along and adjoining the west side of said lot one (1), block four (4), thus making such lot one (1) eighteen (18) feet in width, whereas it is now only ten (10) feet wide, for the purpose of widening the aforesaid space of thirty-eight (38) feet by the additional width of eight (8) feet, making the full breadth of forty-six (46) feet, and thus allowing the needed and indispensable width of sixteen feet for office space and thirty (30) feet for the width of the erecting floor described in such new addition, whose construction is compelled by the exigencies of the business, and is contemplated in the immediate future by the Superior Iron Works, as before stated. Your petitioner further represents to the court that the growth and enlargement of said plant must by necessity of the situation extend and is intended to be extended to the southward of its present location alongside and fronting Lamborn avenue upon and over said lots twenty-three (23) to thirty-two (32), inclusive, in block four (4), in Hayes's addition; that all of said lots belong to the petitioner, and he prays that the map and plat thereof may be so altered by the action of the court as to take off eight (8) feet from the east side of said avenue appurtenant to said lots—being in substance only eight (8) feet off of the sidewalk space of twenty (20) feet—so that such eight feet may be added to the length of each of said lots, making them 133 feet long, the same being now only 125 feet in length. That the narrowing of Lamborn avenue by eight feet along

the entire length of block four (4), in Hayes's addition, bordering on such avenue, still leaves twelve (12) feet for sidewalk space, allowing for the sidewalk itself and alone the full width of eight (8) feet, and four (4) feet over to spare, though a sidewalk eight feet in width is now considered unnecessarily wide, inasmuch as all new cement sidewalks in that vicinity are at present being built by the city six feet wide in place of the former eight-foot plank sidewalks."

It is further alleged that petitioner desires to procure an order from the court vacating a portion of Lamborn avenue described by metes and bounds in said petition, which portion narrows said Lamborn avenue eight feet at the point described. Written notice of the application to vacate was given, and the street committee of the city of Superior reported to the common council, recommending that no objection be made by the city to the granting of the prayer of the petitioner. On the hearing of the petition the city of Superior did not appear, but certain owners of property abutting upon Lamborn avenue appeared by attorney and objected to the jurisdiction of the court in the premises and opposed the granting of the prayer of the petition, and the court ordered the petition dismissed for want of jurisdiction, from which order this appeal was taken.

For the appellant there was a brief by *Hiram Hayes*, petitioner, and *Catlin, Butler & Lyons*, of counsel, and oral argument by *T. E. Lyons*. To the point that statutes authorizing the vacation of plats by courts have often been construed to confer the power, upon application therefor, to vacate a single street or alley, or a part thereof, in such plat, they cited *Case v. Frey*, 24 Mich. 251; *In re Albers's Petition*, 113 Mich. 640, 71 N. W. 1110; *Townsend v. Underwood's Second Addition*, 91 Minn. 242, 97 N. W. 977; *Detroit R. E. Inv. Co. v. Wayne Circuit Judge*, 137 Mich. 108, 100 N. W. 271; *Warren v. Wausau*, 66 Wis. 206; *Brandt v. Milwaukee*, 69 Wis. 386; *Mt. Carmel v. Shaw*, 155 Ill. 37.

For the respondents the cause was submitted on the brief of *E. L. Johnson.*

KERWIN, J. It is plain from the allegations of the petition that the petitioner seeks to vacate part of a public street in the city of Superior under the provisions of secs. 2265, 2266, Stats. (1898). These statutes provide for the vacation of plats and not the vacation of streets, and the main question is whether they authorize the maintenance of the case made by the petition. Sec. 2265 provides, in effect, that the circuit courts may, upon application of the proprietor or proprietors of any recorded plat of land made under the provisions of any law of this state or upon application of the proprietor or proprietors of any part of any plat or of any lot therein, alter or vacate such plat or part thereof, and further provides that such application shall be made to the circuit court of the county in which the plat is situated and how the notice shall be given; and sec. 2266 provides that upon proof of notice the court shall hear the parties interested and determine the petition, and may in its discretion vacate such plat or any part thereof and enter judgment accordingly, and that when only a part of a plat shall be vacated may also direct that the title to such portions of the streets of such plat as shall be vacated shall be vested in the owners of the lots or land abutting on the street or portions of streets so vacated from the line of the respective lots to the center of such streets in such proportions as shall be determined by the court; and that the judgment, together with the plat, if only a part of the plat shall have been vacated, showing the parts so vacated, shall be recorded in the office of the register of deeds.

It is insisted by counsel for respondents that the circuit court has no power to vacate streets, this being a matter purely legislative and vested in the municipality, and that the circuit court under the constitution, being purely a judicial court, is not authorized to exercise legislative power of any

kind—citing *In re North Milwaukee,* 93 Wis. 616, 67 N. W. 1033; *Tilly v. Mitchell & L. Co.* 121 Wis. 1, 98 N. W. 969. Whether the legislature could confer upon the courts power to vacate public highways we need not consider, because we think no such power was attempted under the statutes of this state.

It is not denied but that power is conferred by statute upon the city of Superior to vacate streets in whole or in part, but it is insisted that this power is not exclusive, and that under the statute (secs. 2265 and 2266) above referred to power is also conferred upon the court. These sections of the statute do not purport to authorize the vacation of streets, but merely the vacation of plats. A plat might be vacated and the streets legally laid out and dedicated to the public remain, so far at least as the rights acquired by the public and abutting owners are concerned. True, the statute provides that when a part of a plat shall be vacated the court may by its judgment direct that the title to such portions of the streets of the plat as shall be vacated shall be vested in the owners of the lots or land abutting. It is manifest that this provision is designed merely to follow the vacation and clear the property of the proprietors from the dedication impressed upon it by the recording of the plat so far as the proprietors are concerned, but does not purport to adjust rights acquired, if any, under the plat by the public or third parties. It may well be that the abutting owners upon Lamborn avenue who appeared and objected to the jurisdiction of the court had a property interest in the street which they could not be deprived of without compensation. *Johnson v. Lonstorf,* 128 Wis. 17, 107 N. W. 459. The statute on its face or by any reasonable construction of its language does not give the right to vacate streets in whole or in part. It simply authorizes the vacation of plats or parts thereof and provides for no compensation. It does not purport to interfere with or divest rights acquired under the plat either by the public or by private parties. As appears from

the petition, Lamborn avenue was originally platted seventy feet wide and the common council enlarged it so as to make the portion of it now sought to be narrowed 100 feet wide, so the proceeding here is to vacate a part of the street and thereby make it ninety-two feet wide.

Counsel for appellant relies upon Michigan decisions holding that power under a statute somewhat similar to ours gives the circuit court concurrent jurisdiction with the municipality to vacate streets. The Michigan decisions and some others referred to by appellant appear to support in some degree the contention of appellant, although it is said by the Michigan court that the construction given to the statute is anomalous, because the power to vacate streets is generally confided to municipal authorities, whose action in such cases is discretionary. *Detroit R. E. I. Co. v. Wayne Circuit Judge,* 137 Mich. 108, 100 N. W. 271. But, whatever the rule in Michigan or in other states may be, we think, under the provisions of the charter of the city of Superior and the statutes of this state vesting in the municipality power to vacate streets, secs. 2265, 2266, Stats. (1898), merely authorize the vacation of plats and not the vacation of streets. Subd. 30, sec. 35, ch. 124, Laws of 1891, being charter of the city of Superior; secs. 904, 927, Stats. (1898); *Brandt v. Milwaukee,* 69 Wis. 386, 34 N. W. 246. Counsel seeks to distinguish the *Brandt Case* under the language of the Milwaukee charter provision that the common council shall have authority, "anything in the general law of the state to the contrary notwithstanding," to widen, straighten, and vacate streets. Ch. 184, Laws of 1874. While the Superior charter does not contain this identical provision, it is plain from its terms as well as other statutory provisions relating to municipalities that the power to vacate streets in the city of Superior was given exclusively to the council, and that no authority is conferred upon the courts by secs. 2265, 2266, Stats. (1898), which merely provide for vacation of

plats or parts thereof. If resort to construction were necessary, it is manifest that the legislative policy as indicated in the city charter as well as the statutes of this state shows that the policy of the law is to leave local matters respecting the opening, vacating, and regulation of streets to the municipal authority. Secs. 4986, 4987, Stats. (1898); secs. 904, 927, Id.; ch. 419, Laws of 1891. This policy is not only manifest from legislation upon the subject, but is recognized by the authorities. *Brandt v. Milwaukee,* 69 Wis. 386, 34 N. W. 246; *State ex rel. Jameson v. Denny,* 118 Ind. 382, 21 N. E. 252; Cooley, Const. Lim. 223; *State v. Clarke,* 25 N. J. Law, 54; *State v. Stoll,* 17 Wall. 425; *Harris v. Fond du Lac,* 104 Wis. 44, 80 N. W. 66; *Madden v. Kinney,* 116 Wis. 561, 93 N. W. 535; *Baines v. Janesville,* 100 Wis. 369, 75 N. W. 404; *State v. Morristown,* 33 N. J. Law, 57.

We conclude, therefore, that the general statute (secs. 2265 and 2266) must be held to apply, as its terms import, to the vacation of plats and not to the vacation of streets, and that the vacation of streets in the city of Superior is vested exclusively in the common council. The proceeding in question being to vacate a part of a street, the circuit court was without jurisdiction and the petition was properly dismissed.

Nothing in this opinion is intended to deny the circuit court power to vacate streets which merely appear on the plat but have not been accepted.

By the Court.—The order appealed from is affirmed.

DULUTH LOG COMPANY, Appellant, vs. TOWN OF HAWTHORNE and another, Respondents.

April 1—April 20, 1909.

Taxation: Remedies for wrongful enforcement: Injunction: Pleading.

1. Neither a town nor a town officer has authority to create a cloud upon the title to real estate by mere levy under a tax warrant.
2. Injunction will not lie to prevent a town treasurer from levying upon personal property under his tax warrant. The remedy in such case is to pay the tax under protest and bring suit to recover the unlawful excess, if any.
3. In an action to declare void and to set aside assessments on both real and personal property and to enjoin enforcement thereof, a complaint which fails to allege that the assessment against the real estate, taken alone, was either excessive or discriminatory, and contains averments relative to intentional discrimination and to omission of property from the assessment roll, specifying no property, vague and general, and in the nature of conclusions of the pleader, does not state a cause of action.

MARSHALL and BARNES, JJ., dissent.

APPEAL from an order of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

The appeal is from an order sustaining a demurrer to appellant's amended complaint.

The cause was submitted for the appellant on the brief of *Archibald McKay,* and for the respondent on that of *Frank A. Ross.*

Among other references upon the part of the appellant were the following: *Judd v. Fox Lake,* 28 Wis. 583; *Ean v. C., M. & St. P. R. Co.* 95 Wis. 69, 69 N. W. 997; *Spence v. Spence,* 17 Wis. 448; *Roe v. Lincoln Co.* 56 Wis. 66, 13 N. W. 887; *Williams v. Sexton,* 19 Wis. 42; *Bastian v. Eau Claire,* 56 Wis. 172, 14 N. W. 55.

Among other references upon the part of the respondents were the following: Sec. 1164, Stats. (1898); sec. 2, ch. 284, Laws of 1903.

TIMLIN, J. The amended complaint in question averred that the plaintiff was a Minnesota corporation owning a stock of merchandise, lumber, logs, and a sawmill and certain described real estate in the town of *Hawthorne,* on all of which the plaintiff was required to pay taxes for the year 1907. One of the defendants is a town of Douglas county and the other is the town treasurer of that town. The assessor of that town placed a valuation of over $10,000 "on the plaintiff's said property above described." This valuation was extended upon the tax roll of the defendant town for the year 1907 and a tax of $434.60 levied and charged "against plaintiff's said property." This tax roll was delivered to the treasurer, *Bonnell,* with a warrant authorizing him to collect the tax, and he threatens and holds out that he will collect the "aforesaid tax and assessments against the plaintiff's property and compel the payment of the same, and to that end will levy upon and seize the personal property belonging to plaintiff in the said town, and such collection, levy, and seizure would cause serious loss and irreparable damage to plaintiff's business." It is then averred that the assessment of this property was illegal and void because the valuation placed thereon by the assessor is greatly in excess of its actual market value, etc.; that said assessor purposely and intentionally discriminated in favor of certain residents of the town and against the property owned by the plaintiff and others as nonresidents, assessing the latter class of property at a higher valuation, and omitting from the assessment and tax roll property belonging to town officers and also a large amount of taxable personal property. Plaintiff is unable to ascertain the amount of tax properly chargeable to it, but is willing to pay, and offers to pay, the tax properly chargeable to said property as soon as the same can be legally ascertained. It is then averred that the defendant *Bonnell* threatens and holds out that he will and the plaintiff is informed that he is about to or has levied upon and seized its personal property on account of the taxes

and assessments aforesaid to its irreparable damage, "unless restrained by the order of this court."

The relief demanded is that the taxes and assessments in question be declared void and set aside and held for naught, and that the defendant *Bonnell,* as town treasurer, his deputies, servants, agents, etc., be enjoined and restrained from collecting said taxes or any part thereof, and from levying upon or seizing any of the plaintiff's property or selling the same, or in any manner attempting to enforce the payment of said taxes until the just and equitable amount thereof be ascertained according to law, etc. The demurrer challenges this complaint on the ground that it does not state facts sufficient to constitute a cause of action.

The complaint shows the plaintiff to be the owner of real and personal property subject to assessment and taxation. Without stating the value of either class of property or the valuation fixed by assessment upon either class, it avers that the valuation of all together was fixed by the assessor at $10,000, which was in excess of its market value, discriminatory, etc. This might be true and yet the real estate be not improperly assessed. There is consequently no averment that the assessment against the real estate, taken alone, was either excessive or discriminatory. The averments relative to intentional discrimination on the part of the assessor and those relating to the omission of property from the assessment roll specify no property, and are vague and general, in the nature of conclusions of the pleader, and, while they might be sufficient for some purposes, are not sufficient to overcome our impression of the general nature of the action derived from the facts set forth.

The action is against the town and the town officer, neither of which has any right or authority to create a cloud upon the title to the real estate by mere levy under a tax warrant, and there is no averment that they or either of them intend, or are about, to wrongfully cloud the title of the real estate, or that the tax on the real property is in any respect un-

lawful. The relief demanded is merely to prevent the collection of the tax by the town treasurer by levying upon personal property under his tax warrant. We consider this an action brought for that purpose. No such equitable right of action exists against such defendants. The remedy of the plaintiff in such case is to pay the tax under protest and bring suit to recover the unlawful excess, if any. *A. H. Stange Co. v. Merrill,* 134 Wis. 514, 115 N. W. 116; *Keystone L. Co. v. Pederson,* 93 Wis. 466, 67 N. W. 696.

What would be the remedy of the plaintiff had it pleaded facts showing an unlawful assessment against its real property we need not determine, for there is no such case before the court.

By the Court.—The order of the superior court is affirmed.

The following opinion was filed May 3, 1909:

MARSHALL, J. (*dissenting*). As I understand the opinion of the court the complaint is held bad, because, first, the allegations as to intentional discrimination in the assessment of plaintiff's property are obscure; and, second, because the complaint does not state a cause of action entitling plaintiff to the particular relief prayed for.

If I understand the decisions of this court, neither ground is sufficient to condemn a complaint on demurrer. Therefore, this dissent to what might appear to be the declaration of a new rule of pleading, out of harmony with the statutes (secs. 2668 and 2829, Stats. 1898), which are to the effect that all pleadings shall be liberally construed with a view to substantial justice between the parties and all defects therein not affecting the substantial rights of the adverse party shall be disregarded.

Under those plain rules of the Code it was early said and has, over and over again, been reiterated, that the common-law rule that a pleading, for the purpose of determining its effect, should be viewed most favorably to the adverse party,

has been displaced by duty to view it most favorably to the pleader, to the end that the only recognized legitimate purposes of litigation may be the attainment of justice, and the only recognized legitimate judicial administration the dispensation thereof—that mere technical interference with such administration may be wholly done away with.

Pursuant to the spirit of the statutes it has been frequently held that many facts, as against a challenge for insufficiency, may be pleaded according to their legal effect; and that on such challenge not only facts expressly pleaded, particularly and generally, but all reasonably inferable therefrom, are to be taken account of in support of the pleading. Further, if so broadly viewing the pleading, a cause of action can be gathered therefrom although not the one the pleader intended, nor one warranting the particular relief prayed for, it is to be held good regardless of indefiniteness, redundancy, or nonprejudicial mistakes. The rule was thus stated in the leading and early case on the subject:

"A complaint, to be overthrown by a demurrer or objection to evidence, must be wholly insufficient. If in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if a good cause of action can be gathered from it, it will stand, however inartificially these facts may be presented, or however defective, uncertain, or redundant may be the mode of their statement." *Morse v. Gilman,* 16 Wis. 504, 507.

Note, in the foregoing, how pointedly infirmity of indefiniteness and failure to state the particular cause of action intended—the two suggested in the opinion of the court,—are excluded from defects fatal on a challenge for insufficiency.

In the comparatively recent case of *Miles v. Mut. R. F. L. Asso.* 108 Wis. 421, 427, 84 N. W. 159, 162, the rule was stated thus:

"Criticisms of a pleading will not support a challenge for insufficiency to state a cause of action or defense, if suffi-

ciency can be discovered reasonably by judicial construction of the language used and by reasonable inferences from general allegations. Such pleadings may be open to challenge for uncertainty and indefiniteness, but not insufficiency."

In the still later case of *Emerson v. Nash,* 124 Wis. 369, 102 N. W. 921, this court was furnished with a critical analysis of the pleading, of very much the character now applied in the court's opinion, but it was rejected as out of harmony with the rule of the Code and the uniform administration of it by this court, this language being used:

"It would be a waste of time to follow the analysis of the complaint made by the learned counsel for appellants to see whether the pleading will reasonably permit of the construction they contend for. All might be conceded that is claimed in that regard, and it might be conceded, too, that so viewing the pleading it is fatally defective, without necessarily arriving at a right determination of the controversy now presented, since, as we have seen, the only legitimate test to be applied to the complaint is, Will it reasonably permit of a construction sustaining it? In view of all the facts alleged expressly or by reasonable inference, is the pleading bad, as claimed? If it will satisfy such test it is good on demurrer, as indicated, however plainly it may be open to a motion for indefiniteness and uncertainty." Page 381 (102 N. W. 926).

A large number of cases might be cited, reaching down to several so recent as to be unreported, where the same doctrine as that above stated has been declared and applied. In *Bieri v. Fonger, ante,* p. 150, 120 N. W. 862, the major ground upon which the pleading is now condemned was treated in this way, referring to cases we have cited and others:

"In testing a complaint for sufficiency the question is not whether it states the cause of action the pleader had in mind, or states the facts essential to a good cause of action with technical accuracy and certainty, but is, as said in the initial

case, whether, giving the pleading the benefit of every reasonable inference, it expressly or by such inference, or both, states a good cause of action."

I shall not take time to state here the substance of the complaint showing that, liberally construed, it states a good cause of action to remove from real estate a cloud upon the title created by illegal taxes and prevent further clouding the same by a return of the property for nonpayment of such taxes and sale of the land therefor. I must assume that sufficiently appears from the statement and opinion of the court and must be conceded.

True, the pleader seems to have had in mind a supposed cause of action to prevent enforcement of the taxes by seizure and sale of personal property and to have purposed, mainly at least, if not wholly, to prevent such enforcement, though the prayer is broad enough to cover the proper relief closing the cause of action stated, in fact. Whether it is or is not broad enough is immaterial on demurrer.

After all said on the subject under discussion, as an original matter, it seems that in *A. H. Stange Co. v. Merrill,* 134 Wis. 514, 115 N. W. 115, this court sustained a complaint the same in all essential particulars as the one in question. The pleader there sought to restrain the collection of taxes upon real estate and personalty, while the tax roll was in the hands of the city treasurer, and to have the taxes declared void, it being shown that there was abundance of personal property out of which to collect the tax. The point was made that the only remedy, at such stage of tax proceedings, is to pay the taxes under protest, counsel relying on *Keystone L. Co. v. Pederson,* 93 Wis. 466, 67 N. W. 696, which was an action to recover property levied on by the treasurer for the collection of a tax. Counsel for appellant here relied on that case, and the court now cites the same in support of the opinion. It was, however, held that such case did not rule the situation, except as regards restraint upon

the treasurer to pursue the personalty for collection of the tax; that the spreading of the tax upon the tax roll and delivery of the roll to the treasurer created a cloud on the title to remove which the complaint stated a good cause of action. How the earlier decision rules now is not clear. So far as the prayer of the complaint is any guide to go by, and it is of very little assistance and never controlling, as we have seen, the prayer in the later case is substantially identical with the one here, as I read the two.

In my opinion, the learned trial court in sustaining the demurrer failed to follow the plain declarations of this court governing the matter, and the order appealed from should be reversed.

BARNES, J. I concur in the foregoing dissenting opinion of Mr. Justice MARSHALL.

WILLIAMS, Respondent, vs. ARNOLD and others, Appellants.

April 1—April 20, 1909.

Entire contracts: Breach: Pleading: Amendment to conform to proofs: Excessive damages.

1. The rule that where performance of an entire contract is stipulated in exchange for a specified consideration, performance in full is a condition precedent to a rightful claim for such consideration, does not apply to release from performance in part of an entire contract which is easily severable and may be and is severed into parts to the advantage of the person who has paid for full performance.
2. Where defendants sold two houses to plaintiff for a paid sum, agreeing to keep both houses rented for a certain period, the selling of one does not release defendants from their agreement to keep the other rented.
3. Where evidence warrants a recovery in excess of the amount originally demanded, an amendment of the complaint to con-

form to the proof, increasing the amount of damages claimed, is proper.

4. Where defendants sold houses to plaintiff, agreeing to keep them rented at a given sum for a definite period, and thereafter abandoned the contract, plaintiff, on obtaining the best rental possible, is entitled to recover the difference as damages.

5. Where plaintiff recovered $15.54 more than the total amount lost by defendants' breach of contract, and an allowance of interest from the commencement of the action would exceed that sum, the damages recovered are not excessive.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

Action for damages for breach of contract, commenced January 30, 1908.

Plaintiff's claim was that on July 20, 1905, he purchased two houses of defendants; that, as part consideration for the price paid, they bound themselves to keep such houses rented, at $40 per month for each, to desirable tenants till July 20, 1907, and failed to do so, to his damage $526.96.

Defendants answered, admitting making the contract, denying some allegations in the complaint, pleading that the loss suffered by plaintiff, if any, was attributable to his own breach of contract, specified; that he sold one of the houses with the help of one of the defendants at a profit of more than the loss suffered by reason of the houses not being duly kept rented, and that, by the sale, among other things specified, defendants were rendered unable to carry out their part of the contract.

Upon evidence tending to prove plaintiff's cause of action, the jury found that he offered defendants all reasonable opportunity to keep the houses leased according to the agreement; that, upon their failure to do so, he used reasonable diligence to minimize the loss by reason thereof, and that he suffered damages by reason of the house not being kept constantly rented in the sum of $526.01.

There was a motion for a new trial upon several grounds, among them that the damages found were excessive. The

motion was denied and judgment rendered against the defendants.

H. V. Gard, for the appellants.

Frank A. Ross, for the respondent.

MARSHALL, J. Some points are raised by appellants going to the question of whether the verdict is contrary to the evidence and the law as given by the trial court. The complaints in those respects do not seem to have sufficient merit to warrant more than this brief mention thereof.

It is suggested that the contract was to keep both houses leased to desirable tenants, not merely one of them, and so was entire; therefore that the sale of one within the contract term of two years rendered full performance thereafter impossible and released appellants altogether.

The rule that where performance of an entire contract is stipulated for in exchange for a specified consideration, performance in full is a condition precedent to a rightful claim for such consideration, is very familiar, but it does not apply to release a person from performance in part of an entire contract which is easily severable and may be and is severed into parts to the advantage of such person who has been paid for full performance, as in this case. Conceding appellants' obligation to keep both houses leased for the full stipulated period was entire, compensation was not made contingent upon performance. Appellants received it in advance and were not required to make restitution in any way because they were excused from performing part of the service agreed upon by sale of one of the houses. Upon the theory advanced, if a person pays another full compensation for transporting a quantity of freight from place to place and such other be relieved of part of the burden by such person employing a third to do some of the work, such other will be relieved altogether and entitled to keep the compensation for performance besides. That seems quite absurd. We are

unable to see any application of the rule of law counsel invokes to the facts of the case.

Complaint is made because respondent was permitted, at the close of the testimony, to amend the complaint, increasing the amount of damages claimed, upon the theory that the evidence would justify a verdict for the greater amount. We are unable to discover any error in that. It is a very common and proper thing to allow such an amendment where evidence, in any reasonable view, warrants a recovery in excess of the amount prayed for originally, which was the case here, as we shall see.

While appellants were in default respondent, for the purpose of minimizing the damages, leased one house to the best tenant he could reasonably obtain, who occupied the same during the latter part of the two-year period and for some time thereafter, paying as rent $100, which was less by $42.50 than the amount respondent would have received had the contract not been breached. It is claimed such deficit should not be charged to appellants because they did not guarantee collection of the rent.

The trial court evidently construed the agreement to keep the houses leased to desirable tenants as requiring appellants to supply tenants who would occupy the property and pay the rent, and that so long as appellants abandoned the contract and respondent minimized the damages by obtaining all he reasonably could the deficit was chargeable to the former as damages. That is considered to be correct and to render some other detail objections to the recovery unimportant.

In support of the contention that the verdict is excessive it is urged that if all matters directly or indirectly covered by what has been said must be solved in respondent's favor, the total amount lost was but $510.46, or $15.54 less than the verdict. Counsel makes no allowance for interest, even from the time of commencement of the action. Such interest was clearly respondent's due under the complaint and ex-

ceeds the suggested excess. Interest was claimed on rent lost by the breach from the time the loss accrued, and was respondent's due as part of his damages, and is nearly three times the suggested excess in the verdict. True, the court did not instruct the jury on this subject. It was probably an oversight. The charge is correct as far as it goes, but several matters are not covered.

On the whole, it is the opinion of the court that the verdict was not rendered for quite as much as respondent was entitled to under the complaint, evidence, and findings of fact leading up to the assessment of damages.

By the Court.—The judgment is affirmed.

JOHANSON, Respondent, vs. WEBSTER MANUFACTURING COMPANY, Appellant.

April 1—April 20, 1909.

Master and servant: Injuries to servant: Negligence: Rules and regulations governing conduct of servants: Evidence: Elements of negligence: Contributory negligence: Assumption of risk: Printed case: Costs.

1. In an action by a servant against the master, where the negligence found was failure to promulgate regulations, in the absence of evidence that such failure was efficient to cause the injury a finding that such failure was the proximate cause of the injury is based only upon mere conjecture or guess and is unauthorized.
2. Negligence in law is not mere carelessness, but is careless conduct under such circumstances that an ordinarily prudent person would anticipate some injury to another as a reasonably probable result thereof.
3. Where, in an action for injuries to a servant, the evidence showed that the servant was responsible for scattering benzine on the floor of the work room and that the injury followed its ignition, if a finding by the jury that the master was negligent in permitting the place to become unsafe is allowed to stand, the servant must be deemed guilty of contributory negligence as matter of law.

4. An adult servant assumes all the risks of the employment which are obvious to a person of ordinary intelligence and prudence.
5. The duty of a master to warn a servant of hidden dangers or those of which the servant may be supposed to be ignorant arises only where the master has some reason to believe the servant is ignorant of the danger and needs to be warned.
6. In the case of an adult servant of apparent usual intelligence the master may assume that the servant has the knowledge common to the great mass of mankind unless informed to the contrary, and in such case is not negligent in failing to specially instruct or warn.
7. A woman of middle age, for at least seven years employed in mechanic arts, principally in the mixing and use of paints, and evincing ordinary intelligence and capacity, is presumed to know the inflammability of benzine, and the master is not negligent in failing to warn her of the inflammability of that material. The fact that she was of foreign birth and did not speak English much does not suggest want of intelligence.
8. Printing the case without abridgment of the evidence necessary to present the questions for decision is a violation of Supreme Court Rule 6, and no costs therefor can be recovered.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Reversed.*

Action for personal injuries. The evidence tended to show that plaintiff, a woman of ordinary intelligence, thirty-seven years of age, had been at work for the defendant for a period of seven years, with some intervals, at painting chairs in a room where several other men and women were engaged in similar work. Benzine was used copiously in the process. A closed tank or barrel thereof was located in one corner of the room from which the operatives were accustomed to fill open pails which stood in different parts of the room; the benzine being used to thin the paint, wash brushes and also the hands of the operatives, as they needed, and was continuously being spilled in greater or less quantities about the room. The day of the injury complained of plaintiff had filled a pail situated near her place of work, and at evening, just before 6 o'clock, she had been washing her hands at that pail, and benzine was scattered about on the floor. As

plaintiff was drying her hands, a fire suddenly started at her feet and flamed up, ignited her clothing and burned her severely. She gave somewhat vague testimony of a sound resembling the scratching of a match under or near her foot at the moment the flames started. There was no rule against the employees having matches in their possession, nor evidence that any of them ever did so. There was a rule prohibiting smoking on the premises, which was, so far as appears, uniformly obeyed. Plaintiff professed entire ignorance as to inflammability of benzine. The jury found a special verdict: (1) Plaintiff was injured as she claims. (2) Defendant did not exercise ordinary care in the way of furnishing plaintiff a safe place in which to work, considering the character of the work. (3) Such want of ordinary care was the proximate cause of the accident. (4) Ordinary care required defendant to promulgate among its employees a rule or regulation forbidding the taking of matches within the premises in question. (5) It was lack of ordinary care not to do so and was proximate cause of the accident. (6) The fire was caused by plaintiff's stepping upon and igniting the match. (7) Plaintiff was not chargeable with contributory negligence.

For the appellant there was a brief by *Solon L. Perrin* and *Horatio V. Gard,* and oral argument by *Mr. Perrin.*

For the respondent there was a brief by *Frank A. Ross* and *Heino & Gran,* and oral argument by *Mr. Ross.*

Dodge, J. The judgment is claimed to be supported by either of two phases of negligence found by the special verdict, namely, failure to promulgate regulations against possession of matches by employees in the painting room and failure to provide safe place to work. The first of these requires very little attention, because, whether negligent or not, there is not the slightest evidence of its efficacy in causing the injury. Even if it be conceded that a match was on the floor

and ignited, there is no evidence that any employee brought it or that such rule as contended for would have prevented it. The finding by answer 5 of the special verdict that this omission of rule was the proximate cause of injury could have been based only on mere conjecture or guess and therefore cannot stand. *Spencer v. C., M. & St. P. R. Co.* 105 Wis. 311, 313, 81 N. W. 407; *Gagan v. Janesville,* 106 Wis. 662, 665, 82 N. W. 558; *Dapper v. Milwaukee,* 107 Wis. 88, 92, 82 N. W. 725; *Musbach v. Wis. C. Co.* 108 Wis. 57, 69, 84 N. W. 36.

The remaining support for the judgment is, of course, merely negligence. The original place of labor is not claimed or shown to have been unsafe, but merely that it subsequently became unsafe by reason of the permitted presence of benzine. This could impose liability on the employer only in case its conduct constituted negligence. *Howard v. Beldenville L. Co.* 129 Wis. 98, 108 N. W. 48. Negligence in law is not mere carelessness, but is careless conduct under such circumstances that an ordinarily prudent person would anticipate some injury to another as a reasonably probable result thereof. *Compty v. C. H. Starke D. & D. Co.* 129 Wis. 622, 625, 109 N. W. 650. Now, if the act of permitting employees to scatter benzine promiscuously about the workroom is negligence as above defined, what can be said of the act of the employee who in fact scatters it? Is the latter act any less careless than the former or any less likely to cause injury within the anticipation of an ordinarily prudent person? Surely not. But the evidence is undisputed that the presence of benzine at the place of ignition occurred by plaintiff's own act, that she brought it in an open vessel from the storage barrel, and that she was responsible for scattering it about and onto the floor. In other words, that she voluntarily did the specific act which defendant at most merely tacitly permitted. No theory is conceivable upon which an affirmative answer to the fifth question and a

negative one to the seventh (contributory negligence) can stand together. But both are essential to charge defendant with liability. Defendant must have been negligent and plaintiff not, or she cannot recover. Further, plaintiff assumed all risks of her employment obvious to a person of ordinary prudence and intelligence. *Dugal v. Chippewa Falls,* 101 Wis. 533, 77 N. W. 878; *Sladky v. Marinette L. Co.* 107 Wis. 250, 261, 83 N. W. 514; *Faber v. C. Reiss C. Co.* 124 Wis. 554, 559, 102 N. W. 1049. True, this is subject to the exception that the master owes the duty to warn an employee of hidden dangers or those of which the latter may be supposed to be ignorant. This duty arises, however, only when the employer has some reason to believe that the employee is ignorant of the danger and needs to be warned. In case of an adult of apparent usual intelligence the employer may assume that she has the knowledge common to the great mass of mankind unless informed to the contrary, and in such case is not negligent in failing to specially instruct or warn. *Dahlke v. Ill. S. Co.* 100 Wis. 431, 76 N. W. 362; *Sladky v. Marinette L. Co.* 107 Wis. 250, 261, 83 N. W. 514. No fact is shown by the evidence to arouse this duty in the instant case. Inflammability of benzine in presence of a spark or flame is matter of common knowledge, undoubtedly within the contemplation and anticipation of the mass of mankind and of the ordinarily prudent and intelligent person. Plaintiff was a woman of middle age, for at least seven years employed in mechanic arts, principally in the mixing and use of paints, and evincing ordinary intelligence and capacity. True, as her counsel urges, she was of foreign birth and did not speak English much, but this fact did not suggest want of intelligence. Common sense is not peculiar to English-speaking people. We are convinced that, if the finding of defendant's negligence in permitting the place to become and be unsafe is allowed to stand, the plaintiff must be deemed guilty of contributory negligence

as matter of law, and the answer to the seventh question should have been changed to the affirmative.

The printed case is in very glaring defiance of Supreme Court Rule 6, requiring it to be merely an abridgment of what is necessary to present questions for decision. Counsel have attempted no abridgment of the evidence, but apparently have printed in full the reporter's minutes, including not only questions and answers, with needless repetitions, but even the testimony as to the extent of plaintiff's injuries, which is in no wise relevant to questions raised on the appeal. Counsel owe the duty of relieving this court from the burden of perusing immaterial matter to at least the extent suggested by this rule. Costs for printing a case thus failing to comply are forbidden by Supreme Court Rule 44.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the action: no costs to be taxed for printing case.

HARSEN, Respondent, vs. NORTHERN PACIFIC RAILWAY COMPANY, Appellant.

April 1—April 20, 1909.

Master and servant: Injuries to servant: Care required of foreman: Negligence: Questions for jury: Anticipation of injury.

1. A foreman in charge of servants is required to exercise that degree of precaution and care for the servants' protection which ordinarily careful persons exercise under the same or similar circumstances.
2. Where the inferences from the evidential facts are not so clear and obvious that it can be said that reasonable minds could not differ in their conclusions, the situation presents a proper subject for determination by a jury.
3. Where service in handling heavy timbers is being performed in the open in the winter season, the fact that the timbers so exposed may naturally be covered with ice and snow and when handled slip and injure the servant should, by the exercise of ordinary care, be reasonably anticipated by the master or his foreman in charge of the work.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

This is an action to recover damages for personal injuries claimed to be due to the negligence of an employee of the defendant. The defendant was reconstructing a bridge in the city of Superior over which its track lay. A platform had been constructed beside the track about 100 to 150 feet from the site of the bridge and was being used in the construction work. The platform was about forty feet long, ten feet wide, and six feet high. A number of large square timbers of which the framework of the bridge was being constructed were lying parallel to the platform and about ten feet from it. A timber six by ten inches and about twenty feet long lay from the platform over the edge of one of the large timbers and had been used as a skid. It projected over the edge of the large timber about two and one-half feet into an open space about three feet wide between the timber on which the skid rested and another large timber. Plaintiff had been working as a bridge carpenter for the defendant, framing timbers to be used on the bridge. At the time of the accident one Shaw, the foreman of the crew of men, desired to get out some timbers lying under the skid timber which bridged the space between the platform and the pile of large timbers. It was necessary to remove this skid in order to get the large timbers out and the foreman called the plaintiff to assist him. Plaintiff went to the end of the skid near the two large timbers and put one hand on the end of the skid and the other on its edge, while the foreman went toward the end of the skid lying on the platform. Plaintiff testified that he expected the foreman to go to the other end of the skid, and that they together would carry it to the end of the platform and the large timbers and throw it off and onto the ground. He stated that when the foreman had gone twelve or fourteen feet from him the foreman by a sudden push with his knee against the side of the skid caused it to slide on the ice and snow frozen to it against the timber lying

next to the open space and at right angles to the skid. The plaintiff's fingers were crushed and bruised between the end of the skid and the large timber toward which it slid and it was subsequently necessary to amputate the little finger. The jury by a special verdict resolved all of the questions of negligence and contributory negligence in plaintiff's favor. This is an appeal from the judgment on the verdict.

For the appellant there was a brief by *Louis Hanitch*, attorney, and *C. W. Bunn* and *Emmerson Hadley*, of counsel, and oral argument by *Mr. Hanitch*.

W. P. Crawford, for the respondent.

SIEBECKER, J. The appellant insists that the foregoing facts do not tend to show, as the jury found, that the foreman, Shaw, was negligent and that such negligence was the proximate cause of the plaintiff's injuries. The facts show that the plaintiff was injured by the sliding of the skid and its collision with the timber lying near it. It is a reasonable inference from the evidence, as claimed by the plaintiff, that Shaw caused the skid to slide and injure the plaintiff by the push which it is testified he gave it while plaintiff had hold of the lower end and was waiting to assist in taking it off the platform and timber. Under the circumstances under which the service was being performed the inquiry is: Did Shaw exercise that degree of precaution and care for plaintiff's protection which the facts and circumstances shown demanded of him? Shaw's conduct as to his care must be tested by the rule that he was required to observe such care as ordinarily careful persons exercise under the same or similar circumstances. The inferences from the evidential facts are not so clear and obvious on this point that it can be said that reasonable minds could not differ in their conclusions, and hence it was a proper subject for determination by a jury.

It is urged that the icy condition of the skid was not

known or reasonably to be anticipated by Shaw, and that this condition caused it to slide off the platform and injure the plaintiff. In the light of the fact that the service was being performed in the open in the winter season, and that the timbers when so exposed might naturally be covered with snow and ice, it cannot be said that this icy condition of the skid could not have been foreseen by the exercise of ordinary care by Shaw. We think the jury were amply justified in their conclusion that Shaw omitted to exercise that degree of care demanded of him for the protection of the plaintiff under the circumstances, and that an injury such as resulted to the plaintiff was reasonably to be anticipated. This required submission of these issues to the jury, as the court held.

By the Court.—Judgment affirmed.

DULUTH MUSIC COMPANY, Appellant, vs. CLANCY and another, Respondents.

April 1—April 20, 1909.

Commerce: Interstate commerce: Foreign corporations: Contracts: Validity: Statutory inhibitions: Conditional sales: Rescission: Conditions precedent: Tender: Replevin.

1. Where goods are shipped by a resident of another state to his commission agent in Wisconsin, not in response to an order from a purchaser, but to be held as part of his stock of commission goods in Wisconsin, a sale and delivery thereof by the commission agent is not a transaction of interstate commerce.
2. The place of payment specified in a note given for the purchase of goods under such circumstances, even if in another state, has no bearing upon the question of whether or not the sale and delivery in Wisconsin was an act of interstate commerce.
3. A conditional contract of sale of property located in Wisconsin, made in Wisconsin on behalf of an unlicensed foreign corporation by its resident agent, followed by change of possession and

partial payment, under the provisions of sec. 1770b, Stats. (1898), is void in behalf of the unlicensed corporation, but enforceable against it.

4. In such case the seller cannot assert that no contract ever existed and retake the goods in replevin without tendering a return of what has been received.

5. Although there is a limit beyond which the legislature cannot go in declaring one party to an illegal contract bound and the other free, yet such limit is not reached or passed in a case where such provision is an additional penalty for violation of law, or where the lawbreaking party seeks to assert the invalidity of the contract and recover back its property without returning the consideration received.

6. Where a contract of sale is invalid on account of mistake or fraud, and the seller seeks by replevin of the goods to rescind the contract, he must first return what he has received.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

H. V. Gard, for the appellant, cited, among other cases, *Dunlop v. Mercer,* 156 Fed. 545; *Atlas E. Works v. Parkinson,* 161 Fed. 223; *Chickering-Chase Bros. Co. v. White,* 127 Wis. 83, 106 N. W. 797; *Greek-Am. S. Co. v. Richardson D. Co.* 124 Wis. 469, 102 N. W. 888; *Loverin & B. Co. v. Travis,* 135 Wis. 322, 115 N. W. 829; *Caldwell v. North Carolina,* 187 U. S. 622, 23 Sup. Ct. 229; *Butler Bros. S. Co. v. U. S. R. Co.* 156 Fed. 1; *N. W. U. P. Co. v. Shaw,* 37 Wis. 655.

For the respondents the cause was submitted on the brief of *Dietrich & Dietrich.* Among other references upon the part of the respondents were the following: *Turner v. Pierce,* 31 Wis. 342; *Elwell v. Adder M. Co.* 136 Wis. 82, 116 N. W. 882; *Stahl v. C., St. P., M. & O. R. Co.* 94 Wis. 315, 68 N. W. 954; *Wausau B. Co. v. Plumer,* 35 Wis. 274; *Melchoir v. McCarty,* 31 Wis. 252; *Moore v. Kendall,* 2 Pin. 99; *Cohn v. Heimbauch,* 86 Wis. 176, 56 N. W. 638; *Gibbons v. Ogden,* 9 Wheat. 1; *Brown v. State,* 12 Wheat. 419; *Brown v. Houston,* 114 U. S. 622, 5 Sup. Ct. 1091; *Am. H. Co. v. Shaffer,* 68 Fed. 750; *Robbins v. Shelby Co. Tax. Dist.*

120 U. S. 489, 7 Sup. Ct. 592; *Thormaehlen v. Kaeppel,* 86 Wis. 378, 56 N. W. 1089.

TIMLIN, J. The plaintiff, a foreign stock corporation engaged in the sale of pianos and musical instruments, and which had not complied with the requirements of sec. 1770*b*, Stats. (1898), and amendments thereunto, brought this action of replevin for a piano against the defendants. Its principal place of business is at Duluth, Minnesota, and it had a resident agent at Superior, Wisconsin, who was authorized to sell its pianos in the city of Superior. September 30, 1907, through this agent and at Superior, Wisconsin, the plaintiff sold and delivered to the defendants the piano in question for the agreed price of $300, and received in part payment of the same from the defendants an organ valued at $75, and the defendants executed to the plaintiff at Superior, Wisconsin, on the same day a promissory note payable on or before May 30, 1910, for $225, payable in instalments at the rate of $7 per month beginning on October 30, 1907, and monthly thereafter until paid, with interest at six per cent. per annum. At the same time there was executed by the defendants and delivered to the plaintiff's agent at Superior, Wisconsin, an instrument in writing, wherein it was expressly agreed that the title, ownership, and right of possession in and to the piano did not pass from the plaintiff until the payments specified in the above-mentioned note and the interest thereon had been fully made. This contract contained other provisions to the effect that in the event of failure or neglect to make the payments, or for other reasons specified, the plaintiff might declare the whole amount due and payable and bring suit for the unpaid amount of the note, or might take possession of the piano and sell the same at public or private sale, crediting the net proceeds of sale on this note, and in this case all moneys paid on the purchase price of the piano should be retained by the plaintiff as liq-

uidated damages. This piano was shipped by the plaintiff to its resident agent in Superior some days before the sale thereof, and was by him unboxed, put in his place of business, and thereafter offered to defendants for sale, and sold and delivered to them in Superior, Wisconsin. A few days thereafter the plaintiff signed the conditional sale agreement on its part. Defendants made two payments aggregating $14 on the note, but no more. The plaintiff, before beginning replevin, demanded possession of the piano, which demand was refused. It did not return or offer to return the consideration received. One of the defendants is an infant and was the owner of the organ taken by the plaintiff in exchange, and the other defendant, when the demand for possession of the piano was made by plaintiff, informed plaintiff it could have the piano if the organ was returned. The superior court concluded from the foregoing facts that at the time of the sale of said piano by the plaintiff to defendants and at the time of the execution of the contract of conditional sale the plaintiff could not lawfully transact business or acquire, hold, or dispose of property in this state, and that said contract of conditional sale was wholly void in plaintiff's behalf. He therefore adjudged a return of the piano with six cents damages to the defendants, or, in the alternative, judgment for $200, its value, in case a return could not be had. The case was partly tried to a jury and covered by findings of the court, but no extended reference to that incident of the trial is necessary.

It is thought by appellant that the superior court erred in its conclusions of law based upon the facts above recited, and it contends that the transaction above detailed was one of interstate commerce and therefore valid, but that, even if the conditional sale contract is void, the title and right to possession remained in the plaintiff. Where goods are shipped by a resident of another state to his commission agent in this

state, not in response to an order from a purchaser, but to be held by such agent as the whole or part of his stock of commission goods in this state and thereafter to be sold and delivered from said stock in this state by this commission agent; this last sale and delivery is not a transaction of interstate commerce. *Emert v. Missouri,* 156 U. S. 296, 16 Sup. Ct. 367; *Hynes v. Briggs,* 41 Fed. 468; *Kehrer v. Stewart,* 197 U. S. 60, 25 Sup. Ct. 403; *Loverin & B. Co. v. Travis,* 135 Wis. 322, 115 N. W. 829.

The place of payment specified in the note given for part of the purchase money might in some cases be considered sufficient to stamp the note as a contract of the state of Minnesota where performance was due, but has no bearing upon the question of whether or not the sale and delivery of the piano in Wisconsin was an act of interstate commerce. The contract was void in behalf of the unlicensed corporation, but enforceable by the other party against it by the express terms of sec. 1770*b,* Stats. (1898), as amended by sec. 27, ch. 351, Laws of 1899, sec. 1, ch. 399, Laws of 1901, ch. 434, Laws of 1901, and sec. 1, ch. 506, Laws of 1905.

By another provision of the same statute the unlicensed corporation was forbidden to transact business or acquire or hold or dispose of property in this state, and a penalty is imposed upon it for violation of this interdict. The contract of sale was void so far as it secured any right or title to the plaintiff or changed the usual and ordinary legal consequences of what actually took place, and the attempted sale or disposal of the piano by the plaintiff was forbidden by law and void. *Ashland L. Co. v. Detroit S. Co.* 114 Wis. 66, 89 N. W. 904. The appellant contends, however, that notwithstanding the invalidity of the contract it may recover in replevin because the defendants acquired no right to the piano except that attempted to be conferred by the void contract, and, assuming that the conditional sale contract is

invalid, the former ownership and right of possession of appellant continues unaffected by the void contract. The case of *Dunlop v. Mercer,* 156 Fed. 545, is cited to support this contention and to some extent it does so. But the statute there under consideration, as noted in the opinion, did not, like our statute, declare the contract void in behalf of the unlicensed corporation, but enforceable against it. Nor was there any part performance or part payment by the purchaser, as we understand that decision. There is doubtless a limit beyond which the law cannot go in holding one party to an illegal contract bound and the other free, but that limit is not reached or passed in a case where this provision can be considered an additional penalty on that party for violation of law, or where the lawbreaking party seeks to assert the invalidity of the contract and recover back its property without returning the consideration received by it. Where a contract of sale is invalid on account of mistake or fraud, and a party thereto seeks by replevin of the goods to rescind the contract, he must first return what he has received. 2 Mechem, Sales, §§ 854, 914 *et seq.; Friend Bros. C. Co. v. Hulbert,* 98 Wis. 183, 73 N. W. 784, and cases cited. So where a contract is declared by statute to be void as against one of the parties thereto, but enforceable by the other party against him, as the buyer has by the conditional contract at least the right of possession, the seller cannot assert that no contract ever existed and retake the goods in replevin without tendering a return of what he has received. No such thing was done in this case, and it is undisputed that the appellant received an organ valued at $75 and $14 in money from the defendants in part payment for the piano. It therefore showed no right to maintain the action. If such tender had been made in the instant case we would then reach the question discussed in respondents' brief whether the law would aid the appellant in obtaining a return of its property disposed of and attempted to be sold by it in this state in viola-

tion of law. Because unnecessary to the decision of this case we prefer not to decide that question, but leave it for future argument and investigation should it arise.

By the Court.—The judgment of the superior court is affirmed.

STATE EX REL. BROWN, Appellant, vs. APPLEBY, Respondent.

April 1—April 20, 1909.

Municipal corporations: Police officers: Appointment: "Chief of police:" "City marshal:" "Captain of police."

1. The marshal of a city occupies a position on its police force, and in cities of the second and third class cannot be legally elected or appointed to the office without the concurrence of the board of police and fire commissioners appointed under the requirements of sec. 959—40, Stats. (1898).
2. Under the statutes and city charters of Wisconsin the powers and duties conferred on the "city marshal," "chief of police," and "captain of police" are practically the same, and those terms are synonymous, each city being authorized to denominate a single officer any one of the three distinct names.
3. The term "chief of police" is used in sec. 959—41, Stats. (Laws of 1907, ch. 61), in the sense of chief officer of police, or active head of the police department, and is not limited to an officer technically designated "chief of police."
4. Sec. 959—40 *et seq.*, Stats. (Laws of 1907, ch. 61), confers upon the board of police and fire commissioners the power to appoint a chief of police and takes away from the common council power under the city charter to appoint.

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

This action was brought to oust the defendant from the office of city marshal of the city of Janesville, and resulted in a judgment in defendant's favor.

The city of Janesville was incorporated under ch. 221, Laws of 1882. Sec. 2 of ch. II of that act provided that

one of the officers of said city should be a city marshal. Sec. 18 of ch. III conferred on such marshal all the powers conferred on constables under the general laws of the state, and in addition thereto it was made his duty to cause all laws, ordinances, orders, and resolutions of the city to be kept, and to perform such other duties as the common council should from time to time prescribe. Sec. 46 of ch. XII of the charter provided that no general law of the state contravening the provisions of the charter should be construed as repealing or amending the same unless such purpose was expressly set forth in the law. By ch. 61, Laws of 1907 (sec. 959—40, Stats.), it was provided that in all cities of the second and third class, however incorporated, there should be a board of fire and police commissioners. The city of Janesville is a city of the third class as defined in the general charter law. It was further provided by said act of 1907 (sec. 959—41, Stats.) that the chief of police should be appointed by the board of police and fire commissioners, and that no person should be appointed to any position on the police force without the approval of said board.

Prior to March 30, 1908, W. H. Appleby had been elected to the office of marshal and had been performing the duties of that office. On that day he tendered his resignation to the secretary of the board of police and fire commissioners, to take effect the following day, which resignation was in form accepted, whereupon said board on April 1, 1908, elected the defendant to the office of chief of police of said city. He thereupon qualified and entered upon his duties as police officer, and took possession of the office of city marshal, which had become vacant, and he has since continued to hold the same. On April 20, 1908, the city council elected the relator to the office of marshal and he thereupon qualified. Prior to his election and since he has been a member of the police force of the city of Janesville, but he has never been permitted to exercise the functions or draw

the salary of marshal. The circuit court held that the election of the relator to the office of marshal was illegal, and that the election of the defendant to the office of chief of police or marshal was legal, and from a judgment dismissing the complaint of the relator he brings this appeal.

John Cunningham, attorney, and *F. C. Burpee,* of counsel, for the appellant.

William G. Wheeler, for the respondent.

BARNES, J. Sec. 18 of ch. III of the special charter of the city of Janesville (ch. 221, Laws of 1882) confers on the city marshal all the powers of a constable under the laws of this state. It also provides that

"it shall be his special duty to cause all laws, ordinances, orders, resolutions and by-laws in force in this city to be kept, observed and performed, and to do and perform such acts and duties as said council shall from time to time direct and prescribe."

It is apparent from the law quoted that the city marshal is essentially a police officer, being required to perform the duties and functions invariably required of such officers. The fact that he is incidentally clothed with the powers of a constable does not negative the fact that he is a policeman. It is made his special duty by the charter to enforce the ordinances, orders, and resolutions of the city council, and to perform such other duties as the council may direct. To say that an officer clothed with such powers is not a member of the police force of the city would be contrary to our notion of what the functions of a police officer really are.

Sec. 959—40, Stats. (Laws of 1907, ch. 61), provides for the appointment of a board of police and fire commissioners in all cities of the second and third class however incorporated, and sec. 959—41 vests in such board the power to appoint a chief of police. The city of Janesville is a city of the third class, so the act applies thereto.

Sec. 959—41 further provides that "no person shall be appointed to *any position* either on the police force or in the fire department in any such city except with the approval of such board." If it be conceded that the common council, rather than the board of police and fire commissioners, might still select the marshal, the selection would not become effective until approved by such board. We think it is clear that the marshal of the city occupies a position on its police force, and, if he does, he could not be legally elected or appointed to the office without the concurrence of the aforesaid board. The appellant, therefore, fails to shown that he was duly elected or appointed to the office of city marshal.

There remains to be considered the question whether so much of sec. 959—41 as confers upon the board of police and fire commissioners the power to appoint a chief of police took away from the common council the power to appoint a city marshal. In a number of cities of the second and third class operating under special charters, the chief officer of police is designated "city marshal." In a number of other such cities such officer is designated "chief of police." Whichever designation is adopted, the powers conferred are practically the same. In but one city do both offices seem to exist. The general charter law (sec. 925—259, Stats. 1898) provides:

"The city marshal shall be known as such or as captain or chief of police, in the discretion of the council, and shall have command of the police force of the city under the direction of the mayor."

This language indicates that the legislative thought was that the terms "marshal," "chief of police," and "captain of police" were synonymous, and each city might exercise its taste in christening a single officer any one of three distinct names, the powers and duties of the officer exercising the functions of the office being the same no matter how designated. Secs. 959—40 *et seq.* were intended to place the appointment of firemen and policemen under civil service rules,

and no reason is apparent why such rules should be applied to the appointment of a chief of police and not to the appointment of a city marshal; and it is entirely reasonable to suppose that the legislature used the term "chief of police" in sec. 959—41, Stats. (Laws of 1907, ch. 61), in the sense of chief officer of police, or active head of the police department, rather than in a more restrictive sense, by which it might be limited to an officer technically designated "chief of police." We think the language of the statute may be so construed without doing violence to the letter thereof, and that such construction effectuates the manifest purpose the legislature had in view in enacting the law.

By the Court.—Judgment affirmed.

AMERICAN STATES SECURITY COMPANY, Respondent, vs. MILWAUKEE NORTHERN RAILWAY COMPANY, Appellant.

April 2—April 20, 1909.

Terms of court: Regular and special terms: Appeal and error: Exceptions to instructions: Time to present: Statutes: Eminent domain: Railroad right of way: Compensation: Instructions to jury: "Fair market value:" Harmless error: Trial: View: Competency as evidence: Evidence: Values: Sales of other property: Admission of evidence: Preliminary questions.

1. A proceeding in the determination of an action, the trial of which was commenced at a regular term, had at a special term before the termination of such regular term, is had at or during the regular term.
2. Exceptions to instructions to the jury made and presented for consideration of the trial court at a special term then pending, the regular term at which the trial took place being also pending, is an efficient preservation of the exceptions, although they did not formally reach the clerk of the court for the trial county until after the trial term. Presentation at the special term within the regular term satisfies the statute.
3. In condemnation of lands for railroad right of way it is not error to instruct the jury to value the strip taken as part and parcel of the entire tract of which it formed a part.

4. In condemnation of lands for a railroad right of way it is not error to instruct the jury that in estimating the damages to the part not taken the measure is the difference, at the time of the commissioners' report, between the market value of the premises with the road located upon the strip and the market value at that time freed from the use and burden of the road, less any special benefits, explaining the meaning of the term "special benefits," and stating, generally, that the landowner is entitled to recover such sum as would compensate him for the land and the damages he may have sustained; such sum as would make him as good as if the railroad had not been located on the land.
5. It is not error to instruct the jury in proceedings to condemn land that the fair market value is the "full fair market value" and such sum as the property is worth to persons generally who would pay its "just and full value."
6. In condemnation of land for a railroad right of way, error, if any, in admitting evidence as to the value of the strip taken as if the value of the improvements located on the lands not taken was distributed proportionally acre by acre over the whole tract is cured by instructions that the limit of recovery is the difference between the fair market value of the whole land as it existed at the time the commissioners made their award and the fair market value of what remained after the taking.
7. A jury has a right to act upon knowledge as to that which they saw on a view of the premises in dispute in determining the credibility of evidence, and instructions to that effect are not error.
8. In condemnation of land for a railroad, where there is evidence tending to show that witnesses were influenced in testifying on the question of damages to the land not taken by benefits to the premises by the construction of the road, it is proper to explain to the jury the distinction between special and general benefits, and that the former, but not the latter, are to be considered in reduction of the measure of depreciation in fair market value.
9. On the question of value, where lands in the vicinity are sufficiently similar in character to the lands in question and the time of their sale is sufficiently near that with reference to which the value of the land in question is to be fixed and all circumstances of the two situations are sufficiently similar, and, in the judgment of the trial judge, comparison will afford aid to the jury in solving the issue of value, evidence of the selling price of such other lands is admissible.
10. The offer of such evidence presents a primary question of competency, and the ruling thereon cannot be disturbed on appeal unless manifestly wrong.

APPEAL from a judgment of the circuit court for Ozaukee county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

Action to determine compensation for taking land for railway purposes.

The amount taken was 1.63 acres out of 65 acres. The strip left plaintiff's premises in one part of 37 acres and another of 26.37 acres, the latter having thereon costly improvements including a stone house and barn. There was evidence on plaintiff's part that the strip taken, as a part of the whole tract, not considering the added value by reason of buildings, was worth as much as $120 per acre, and with such added value $300 per acre, and that the part not taken was diminished in value by the segregation as much as $2,500. There was evidence on defendant's part placing the fair market value of the strip, considered as a part of the whole, and the damages to the part not taken as low as $291. The jury rendered a verdict of $1,150.

There was a motion on the court's minutes for a new trial made at the trial term which, by stipulation, was heard and decided at a special term in another county. Exceptions to the instructions were presented at the hearing and later filed with the clerk of the circuit court in the trial county, after the date for the commencement of the next term of court therein. The record does not show such trial term to have been, prior to such special term, terminated by special order. The motion was denied, the ruling excepted to, and the exception preserved in the bill. Judgment was rendered for plaintiff.

For the appellant there was a brief by *Winkler, Flanders, Bottum & Fawsett,* and oral argument by *C. E. Monroe.*

Wm. F. Schanen, attorney, and *James D. Shaw,* of counsel, for the respondent.

MARSHALL, J. Respondent's counsel insist that appellant is not in a position to raise any question as to error in in-

structions because exceptions were not filed during the trial term, nor error in denying the motion for a new trial because no exception was taken to the ruling on that question.

Sec. 2869, Stats. (1898), requires exceptions to instructions to be made during the pendency of the trial term. By ch. 6, Laws of 1905, a regular term of court in any county is presumed to continue till the commencement of the next general term in such county, unless terminated by special order, notwithstanding any intervening special term.

A proceeding in the determination of an action, the trial of which was commenced at a regular term, had at a special term before the termination of such regular term, is, to all intents and purposes, deemed to have been had at or during the latter. *Frost v. Meyer,* 137 Wis. 255, 118 N. W. 811. The commencement of the trial term here was the first Tuesday in March, 1908. The next regular term commenced on the first Tuesday of September, 1908. The exceptions were made and presented for consideration of the trial court on the 25th day of August, 1908, at a special term then pending, the regular term being also pending, as we must presume, because of no special order appearing in the record terminating it. This makes the record complete in appellant's favor as to efficient preservation of the exceptions, though they did not formally reach the clerk of the circuit court for the trial county till after the trial term. Presentation thereof at the special term within the regular term satisfied the statute.

The learned trial court submitted the cause to the jury to find "the fair market value of the strip of land actually taken" for the right of way, at the time of the award by the commissioners, "as a part and parcel of the whole tract from which it was taken," and "the damage, if any, suffered by plaintiff to the rest of his premises" from which the part taken was segregated, stating to the jury that the fair market

value mentioned was "the full fair market value" and was "such a sum as the property was worth in the market to persons generally who would pay its just and full value," "what the property was worth, or will sell for, as between one who wants to purchase and one who wants to sell;" and further stating, as to recoverable damages, respecting the land not taken from which the strip was segregated, that the measure was the difference, if any, at the time of the commissioners' report "between the market value of the premises with the road located upon that strip, and the market value at that time freed from the use and burden of the road," less special benefits, if any, explaining the meaning of the term "special benefits," and stating, generally, that the landowner was entitled to recover "such sum as will compensate it for the land and the damages it may have sustained; . . . such sum as will make it as good as if the railroad had not been located on the land."

The manner of valuing the strip taken as part and parcel of the entire tract of which it formed a part, is in strict accord with the rule laid down in *Barker v. M. & L. W. R. Co.* 59 Wis. 364, 375, 18 N. W. 328; *Watson v. M. & M. R. Co.* 57 Wis. 332, 354, 15 N. W. 468; *Washburn v. M. & L. W. R. Co.* 59 Wis. 364, 18 N. W. 328; *Esch v. C., M. & St. P. R. Co.* 72 Wis. 229, 39 N. W. 129, and similar cases.

The recoverable damages to the lands not taken, as given to the jury, is in strict accord with the rule laid down in *Weyer v. C., W. & N. R. Co.* 68 Wis. 180, 31 N. W. 710, and similar cases. The statement as to the amount recoverable, in the whole, is in accord with the rule laid down in *Driver v. W. U. R. Co.* 32 Wis. 569, and *Watson v. M. & M. R. Co., supra.* In the latter the court said the landowner is entitled to the difference between the fair market value of the whole property before the taking and the fair market value of what remains after the taking. In *Esch v. C., M.*

& St. P. R. Co. 72 Wis. 229, 232, 39 N. W. 130, speaking on the same subject, the law was indicated thus:

"The jury must have understood from the instructions given that the plaintiff was entitled to a just compensation for his property taken and the injury done him, which was to be ascertained from the evidence as to what the property would sell for or was worth in the market before the strip was taken, and after such strip was taken. In estimating this value and damage the jury would necessarily determine what the property was fairly worth in the market before the strip was taken, and what it was worth after the company had taken the strip for depot purposes. We do not think it was necessary to state the rules for determining the value with any greater particularity to guide the jury. When the jury, in obedience to the instructions given, assesses the value of the strip taken as a part of the whole lot, and as a parcel of the same, and determined the damages suffered by the plaintiff by reason of the taking to the balance of the lot not taken, these two amounts, added, would give the plaintiff's compensation precisely as the rule was laid down by the trial court in the *Watson Case,* which was approved by this court."

Particular complaint is made because the court used the term "full and fair" market value and defined it as "such a sum as the property was worth in the market to persons generally who would pay its just and full value." Such language seems to have been copied, verbatim, from instructions approved in the *Esch Case* as substantially correct.

Error is assigned because witnesses were permitted to testify to the value of the strip taken as if the value of the improvements located on the lands not taken was distributed proportionally acre by acre over the entire land. It does not seem that such evidence could have prejudiced appellant in any way, since evidence was given of the value of the strip without the improvements and as a part and parcel of the whole tract, and the case was submitted to the jury in such a way as to avoid danger of duplication of damages and to secure an assessment upon the proper basis. They were told, in

plain language, that the limit of the recoverable amount was the difference between the fair market value of the whole land as it existed at the time the commissioners made their award and the fair market value of what remained after the taking. That concise statement, explanatory of all that preceded it as to the elements of the recoverable amount, cured any slight departure from correct rules in admission of evidence.

This language in the court's instruction is complained of:

"If any witness produced upon the trial has testified to anything which you know by the evidence of your senses on the view, is false, you are not bound to believe the witness as to such fact, and you may disregard his testimony as to said fact, although no other witness has testified on the stand to the fact as the jury knows it to be."

There was considerable conflict in respect to matters which came under the observation of the jury at the view they were afforded of the premises. Certainly the jury had a right to act upon their own knowledge as to that which they saw in determining the credibility of evidence. That is the purpose of a view. As said in *Washburn v. M. & L. W. R. Co.* 59 Wis. 364, 18 N. W. 328, "what the jury saw they knew absolutely and it was their right to act accordingly." The language excepted to was taken from the opinion of this court in the case cited. This illustration was there given:

"If a witness testify that a certain farm is hilly and rugged, when the view has disclosed to the jury and to every juror alike that it is level and smooth, or if a witness testify that a given building was burned before the view discloses that it had not been burned, no contrary testimony of witnesses on the stand is required to authorize the jury to find the fact as it is, in disregard of testimony given in court."

There was evidence tending to show that witnesses were influenced in testifying on the question of damages to the land not taken by benefits to the premises by the construction of the road. So the court explained to the jury the distinc-

tion between special and general benefits and that the former, but not the latter, could be considered in reduction of the measure of depreciation in fair market value. That was proper.

Error is assigned because evidence of sales to defendant of other lands in the vicinity of plaintiff's farm was rejected. Such evidence is admissible or not according to circumstances. *Watson v. M. & M. R. Co.* 57 Wis. 332, 350, 15 N. W. 468; *Stolze v. Manitowoc T. Co.* 100 Wis. 208, 214, 75 N. W. 987. Where lands are sufficiently similar in character to the lands in question and the time of sale is sufficiently near that with reference to which the value of the land in question is to be fixed and all circumstances of the two situations are sufficiently similar, in the judgment of the trial judge, that the comparison will afford aid to the jury in solving the issue to be determined, the evidence should be admitted. So it will be seen that the offer always presents a primary question of competency, and the exclusion thereof cannot be disturbed on appeal unless manifestly wrong. *Emery v. State,* 101 Wis. 627, 648, 78 N. W. 145; *Schwantes v. State,* 127 Wis. 160, 187, 106 N. W. 237; *Kavanaugh v. Wausau,* 120 Wis. 611, 618, 98 N. W. 550. Under that rule the rejection of the offered testimony cannot be condemned.

The foregoing covers all matters of moment called to our attention. It is considered that the record does not disclose any prejudicial error.

By the Court.—Judgment affirmed.

KRIER and another, Respondents, vs. MILWAUKEE NORTHERN RAILWAY COMPANY, Appellant.

April 2—April 20, 1909.

Evidence: Trial: Expert witnesses: Mode of examination: Eminent domain: Compensation: Appeal and error: Invited error: Waiver: Right to compensation: Values: Excessive damages.

1. In determining the compensation for land taken by condemnation, objection to the form of a question as to the depreciation in value of the land not taken, "What is the depreciation," etc., instead of "What is the depreciation, if any," etc., is hypercritical and without merit, especially when the objector used the same form of interrogation and several witnesses answered there was no depreciation.
2. A question as to the value of land taken by condemnation must call for the value of the land as a portion of the tract of which it forms a part.
3. A party cannot complain of the form of questions asked witnesses by the adverse party where the questions he asked his own witnesses were of the same nature.
4. One may purchase or improve real estate in anticipation of and regardless of any probability of part or all of it being subsequently appropriated for public purposes. To do so is not evidence of bad faith.
5. In condemnation proceedings evidence on the one side of value of the strip taken as high as $6,000, and damages to the remainder not taken as high as $3,000, and on the other that the value of the strip taken did not exceed $300 and that the residue was not damaged, presents credible evidence which justifies the appellate court in refusing to set aside a verdict of $1,800 as excessive.

APPEAL from a judgment of the circuit court for Ozaukee county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

Action to determine the compensation due plaintiffs for land taken for railway purposes and depreciation of that part of the entire parcel from which it was taken by reason of the appropriation.

There was evidence on plaintiffs' part fixing the value of

the strip taken as high as $6,000, and the depreciation of the remainder of the parcel, by reason of the taking, at $3,000. There was evidence on defendant's part that the value of the strip taken was $300 and the residue of the parcel was not damaged at all. Both sides asked questions in substantially the same form as to the strip taken. The jury found in plaintiffs' favor, $1,800. Similar proceedings occurred after verdict as in *American States S. Co. v. M. N. R. Co., ante,* p. 199, 120 N. W. 844. Defendant appealed from the judgment.

For the appellant there was a brief by *Winkler, Flanders, Bottum & Fawsett,* and oral argument by *C. E. Monroe.*

Wm. F. Schanen, attorney, and *James D. Shaw,* of counsel, for the respondents.

MARSHALL, J. Questions of practice and as to the meaning of "fair market value" are raised in this case as in *American States S. Co. v. M. N. R. Co., ante,* p. 199, 120 N. W. 844, and are ruled by what is there said. The case was submitted to the jury, as to law, substantially the same in both cases. Therefore the opinion in the first case is to be deemed repeated here so far as applicable.

Error is assigned because of the form of the question relating to depreciation in value of the land not taken, in that the witnesses were asked, "What is the depreciation," etc., instead of "What is the depreciation, if any," etc. The complaint, at this point, strikes us as rather hypercritical and far from being meritorious. Witnesses and jurors must be considered to be men of ordinary common sense. A witness would not, ordinarily, be influenced to testify to depreciation in fact, merely by reason of the form of the question, in case of his judgment being otherwise. That is demonstrated by the fact that the same form was used on both sides, and several witnesses answered there was no depreciation.

Further complaint is made of the form of questions al-

lowed on the part of respondents as to the value of the strip of land taken, in that it referred to the strip without adding the words "as a part and parcel of the tract of which it formed a part" or similar words. Technical accuracy required the questions to include such words. Refusal to permit proof of the fair market value on the base of questions so accurately framed has been held harmful error (*Barker v. M. & L. W. R. Co.* 59 Wis. 364, 375, 18 N. W. 328), the error being regarded as prejudicial because the court ruled that the value of the strip was to be ascertained without reference to the balance of the land, and, presumably, would be less in such case than by the true rule, and, so, not afford the landowner the full and just compensation which is his constitutional right.

The court did not make any such mistake in this case. The submission to the jury was by the proper rule. Moreover, if there were infirmity in the mere form of the question—prejudicial at all—it was to respondents rather than appellant. Further, the latter is not in good form in making the criticism because the questions to its witnesses were of the same faulty nature.

There was evidence that respondents purchased the premises shortly before the appropriation of part thereof by appellant and, may be, with the knowledge of probability of the appropriation which occurred. In respect to that the jury were instructed:

"In arriving at the sum that is to be allowed and awarded the plaintiff, you are not to consider whether the plaintiff or his grantor had, or had not, any knowledge as to where the line was going to be located."

The jury were not told that the circumstance referred to could not be considered as bearing on the credibility of respondents' evidence, but that it could not, legitimately, affect the recoverable damages. We are unable to discover any error in that. It was perfectly competent for respondents

to deal with the property regardless of any probability of a part of it being subsequently appropriated for public purposes. They had a right to assume that if any invasion of the premises under the right of eminent domain should occur it would be without prejudice to them, in that for every dollar in value of property taken or damaged they would receive a full equivalent. The learned court prudently phrased the instruction with *Driver v. W. U. R. Co.* 32 Wis. 569, 580, before him, where the principle embodied therein is declared.

A person has the undoubted right to buy or improve realty in the face of a probability that it may be invaded, as in this case. To do so is not evidence of bad faith. Furthermore, the property owner owes no duty to the prospective appropriator to consider its interests in what he shall do with his own. Whether, in any given case, he proceeds with the idea that the value of improvements made in the face of probable appropriation will enhance the damages he will contingently suffer or not, has nothing to do with the abstract question as to his right to full compensation if appropriation occurs. It is his constitutional right to buy, hold, and improve property as he sees fit and rely upon the fundamental guaranty that, to the extent he shall be deprived thereof under the power of eminent domain, he will, as a condition precedent, receive a full equivalent.

It is suggested that the amount of recovery is excessive. On this observations made, going to the weight of evidence, we shall not discuss. There was evidence on both sides taking quite a wide range. On the side of respondents the value and damages were placed as high as $3,500. The depreciation in fair market value of the part not taken was placed as high as $3,000. There was evidence on the part of appellant placing the recoverable amount as low as $300, and evidence tending to show that the fair value of the entire property before the taking was $7,000 to $8,000, and such

value of the part remaining after the taking $4,000 to $5,000. On the whole, it is quite clear from the record that the jury, from competent evidence, as was said in *Esch v. C., M. & St. P. R. Co.* 72 Wis. 229, 39 N. W. 129, determined, in general effect at least, the fair market value of the whole property before the strip was taken and the fair market value of what remained after the taking and rendered their verdict for the difference. They were plainly instructed by the court that, in general, that was the proper basis for the recovery. True, some of the expert evidence is not very satisfactory. True, witnesses on one side suspiciously exaggerated the value and damages, but on the other side there are indications that the same were understated. However, so far as we can discover, all seems to have been clearly within, or so near, the boundary of competency that we cannot well say anything thereof was improperly admitted. Beyond that is the field of weight and credibility in which the jury were substantially supreme. Their findings must be taken as the indisputable truth, if at all reasonable from any fair view of any credible evidence. They seem to have proceeded within the boundaries of reason, making the finding only about one half the amount claimed by respondents.

By the Court.—The judgment is affirmed.

PHILLER, Appellant, vs. WAUKESHA COUNTY, Respondent.

April 2—April 20, 1909.

Witnesses: Compensation: Experts: Counties: Criminal cases: Liability of county for witness fees: Defendant's experts.

1. The statute requiring all persons to obey the subpœna of a court, and fixing their compensation at $1.50 per day, applies to an expert witness, and hence from the mere subpœna and compulsion to testify results no implied contract to pay an

expert witness anything in excess of the statutory fees, recognizing, however, that if he does perform work in preparation and qualification at the request of a party, an implied contract for reasonable compensation may arise, and an express contract therefor will be valid.

2. Liability cannot be imposed upon a county or other governmental subdivision of the state except in accordance with statute law, and hence, in the absence of a statute authorizing counsel for a defendant, charged with homicide, to contract with a physician as a witness for the accused to make preparation to testify as an expert at the county's expense, no liability against the county is created.

3. In criminal prosecutions an order of the court for compulsory attendance of the accused's witnesses is a necessary prerequisite to the existence of any liability of the county for witness fees therefor, and in an action against the county for the statutory witness fees for attendance upon the trial of a criminal action a complaint which fails to allege such order fails to state a cause of action.

APPEAL from an order of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

Appeal by plaintiff from order sustaining demurrer to the complaint, wherein it was alleged that plaintiff was a competent physician; that in January, 1907, one McMahon was charged with the crime of murder and interposed a plea of insanity; that plaintiff, at the request of McMahon's attorneys and upon their assurance that the county would be liable for his services, made careful medical examination of said McMahon with reference to sanity, and in January attended upon the trial and gave testimony as an expert witness five days in response to subpœna, and upon the second trial of said issue in July he similarly attended seven days and gave testimony as an expert, apparently on behalf of the defendant. He presented separate bills for the two trials at $50 per day to the county board, which were disallowed by a single order or vote, and he duly appealed to the circuit court. A demurrer on various grounds was interposed, but sustained on the ground that the complaint failed to state a ca se of action against the county.

The cause was submitted for the appellant on the brief of *Ryan, Merton & Newbury,* and for the respondent on that of *Milo Muckleston,* district attorney, and *V. H. Tichenor,* of counsel.

DODGE, J. 1. The complaint evinces a main purpose to state a cause of action against the county for the value of a physician's time and services in making examinations of the symptoms and mental condition of a defendant in a criminal trial and in attending court to testify with respect to his sanity "as an expert witness," in the words of the complaint. Except for said quoted clause there is no suggestion as to the character of the testimony he gave, whether it related to facts which he discovered by observation, albeit a trained and expert observation, or to an opinion; probably both.

The effect of our statutes is to require all persons to obey the subpœna of a court, and their compensation for such obedience is fixed at $1.50 per day, with mileage. Secs. 4063, 4064, 4067, Stats. (1898). In a civil action between private parties those fees must be paid in advance, if demanded. Sec. 4057, Stats. (1898). In a criminal case they need not be tendered or paid in advance (sec. 4058, Stats. 1898), though doubtless a contract may in some cases be implied to pay the specified fees for the service. The duty of every witness is to attend as long as commanded and to testify to all material facts within his knowledge. This is a duty resting upon all members of the community as such to aid the courts in the administration of justice, and insistence upon it by the courts does not constitute such a taking of property as is forbidden by the constitution. *West v. State,* 1 Wis. 209. This is not seriously controverted by the appellant's counsel in its application to what they call ordinary witnesses testifying to ordinary facts, but they contend that when a physician is called upon to give expert testimony his services are of a different character and cannot be demanded

without compensation. The word "expert" in this connection is somewhat loose and uncertain. Much of the testimony of a so-called expert is in no wise different in character from that of any other witness. He may be called on to testify to that which he sees, hears, or otherwise discovers by the use of his senses; but those facts may be such that no one but a trained expert would discover them by such use of his senses. A skilled physician discovers facts by the use of sight, hearing, or feeling which another man might not. But this distinction is one of degree merely and not of kind. All men differ in their ability to observe accurately and in the certainty of knowledge which they derive from such observation. An illustration of such testimony, not in the legal sense expert, and yet dependent on the peculiar knowledge and abilities of the witness, is presented in *Hocking v. Windsor Spring Co.* 131 Wis. 532, 539, 111 N. W. 685, where an oculist, not competent under our law to testify as an expert, was allowed to testify to physical injuries which doubtless could not have been seen and discovered or described by a nonprofessional. There can be no doubt in this field that every man owes a duty to attend and testify to the material facts that he knows notwithstanding the knowledge thereof may be due either to his learning or his expert faculties. Any attempt to draw a line between the exceptionally stupid and nonobservant person and others who, by greater alertness, training, or skill in observation, may acquire more knowledge, is impracticable and irrational. The educated and intelligent owe the same duty of aid to the courts up to the limit of their ability as does the less competent man—the man whose services are worth $50 per day as well as he whose time is worth but $2. The more difficult field is entered when we approach the question of calling upon men of exceptional experience and qualifications to give their opinion as the result either of facts which they observe or from an hypothetical statement of facts. This is the real field of expert evidence. It is

there that the expert can testify and the nonexpert cannot. But here also the expression "expert" is of very broad meaning. It includes the mechanic, whose opinion may be asked upon the strength or value of a brick wall or chimney, or the farmer, with reference to quality and value of lands, crops, or farm animals, as well as the man of most abstruse research and learning in the fields of chemistry and bacteriology or medicine. So here, again, no line can be drawn on principle between the men or the testimony in favor of a physician over a bricklayer. It would seem on principle, in analogy to the previous discussion, that if from the witness's observation or from the hypothetical facts stated to him he has consciously in mind either knowledge or an opinion, such knowledge or existent opinion is a fact as to which he may be required to testify; but, as is often the case, and in the higher branches of expert learning perhaps usually, an amount of study, experimentation, thought, and reflection may be necessary to the formation of an opinion, and the witness may often honestly answer that he has not formed such opinion. The chemist, after submitting a substance to various analyses and reactions, may yet need to study the books or make further experimentation before he can assert the presence or absence of certain elements. The physician, after exhaustive inspection and tests, is still often left in doubt, and does not venture an opinion to his patient until after long study. Such study, reflection, etc., is not the function of the ordinary witness. It is not within the command of the subpœna, and there is no reason to think that the statutes were intended to require it of any witness merely as such. If a party desires that any witness, expert or otherwise, equip himself with knowledge by research or inspection, it may employ him to do so, but such employment will be controlled by the ordinary rules of contract, express or implied.

In some of the earlier text-books and decisions it was asserted that courts could not or would not compel certain

professional men to attend and testify on professional subjects for the mere ordinary witness fee, more especially on the ground that the time of such witnesses was so valuable that they ought not to be thus coerced. *In re Roelker,* 1 Spr. Dec. 276, Fed. Cas. No. 11,995; Ordronaux, Med. Jur. (ed. 1869) 138; 1 Greenl. Ev. (13th ed.) § 310; 1 Taylor, Med. Jur. 19; *People v. Montgomery,* 13 Abb. Pr. N. S. 207; *Buchman v. State,* 59 Ind. 1. Most of these seem to result from a custom amongst the English courts to treat physicians and lawyers as exempt from coerced attendance on the same terms as other witnesses, a custom often criticised, but which had some justification in an early statute (5 Eliz. ch. 9) which provided for the tender to a witness "according to countenance or calling his reasonable charges." *Webb v. Page,* 1 Carr. & K. 23; *Lonergan v. Royal Exch. Assurance,* 7 Bing. 725; *Collins v. Godefroy,* 1 B. & Ad. 950; *Parkinson v. Atkinson,* 31 L. J. N. S. C. P. 199. The fallacy of the reason on which these earlier customs were supported has, however, been recognized and their authority repudiated in a great multitude of more recent decisions. *Ex parte Dement,* 53 Ala. 389; *Summers v. State,* 5 Tex. App. 365, 374; *State v. Teipner,* 36 Minn. 535, 32 N. W. 678; *Larimer Co. v. Lee,* 3 Colo. App. 177, 32 Pac. 841; *Flinn v. Prairie Co.* 60 Ark. 204, 29 S. W. 459; *Dixon v. People,* 168 Ill. 179, 48 N. E. 108; *Burnett v. Freeman,* 125 Mo. App. 683, 103 S. W. 121; *State v. Bell,* 212 Mo. 111, 127, 111 S. W. 24; *Main v. Sherman Co.* 74 Neb. 155, 103 N. W. 1038; *Barrus v. Phaneuf,* 166 Mass. 123, 44 N. E. 141; 3 Wigmore, Ev. 2203. The result of these cases is that the expert, be he mechanic, physician, engineer, or chemist, must obey the subpœna of the court and must testify to such facts as are within his knowledge, whether these facts may have required professional learning, study, or skill to ascertain them or not. If, when placed on the witness stand, he has such knowledge, he must testify to it. They substantially all recognize, how-

ever, that the subpœna under statutes like ours does not compel the expert nor other witness to equip himself by labor with ability to testify either to an opinion or to any other fact which might be ascertained by special services, and hence that from the mere subpœna and compulsion to testify as a witness results no implied contract upon any one to pay the expert anything in excess of the statutory fees, recognizing, however, that, if he does perform work in preparation and qualification to enable him to testify at the request of any person, implied contract for reasonable compensation may arise, or an express contract will be valid. *Barrus v. Phaneuf, supra; Tiffany v. Kellogg Iron Works,* 59 Misc. 113, 109 N. Y. Supp. 754; *Anderson v. M., St. P. & S. S. M. R. Co.* 103 Minn. 184, 114 N. W. 744; *Schofield v. Little,* 2 Ga. App. 286, 58 S. E. 666.

Applying these principles to the present case, it is very obvious that no statute has authorized any one to make any contract for such services at the expense of the county. The allegation of the complaint is that all services of that character were performed at the request of the attorneys for the accused, albeit with their assurance that the county would be liable therefor. Liability cannot be imposed upon counties or other governmental subdivisions of the state except in accordance with statute law, and no statute is referred to conferring any such authority upon counsel for one accused of crime. We are therefore unable to discover any basis upon which the county of *Waukesha* can be held liable for any compensation to this witness other than the statutory fees, if indeed it can be made liable for those.

2. We are in much doubt whether the complaint attempts to state any claim for statutory witness fees, or indeed whether they may not have been paid in this case in the manner customary in criminal cases and especially homicide cases. A very liberal construction of the complaint might disclose facts stated or reasonably implied to indicate the

earning of such fees, in that plaintiff under subpœna attended court five days and gave testimony for the defendant. The right to fees from the public must be found in the statute. The only provisions in statute law bearing upon this subject are the constitution (art. I, sec. 7), that the accused shall "have compulsory process to compel the attendance of witnesses in his behalf," and sec. 4641, Stats. (1898), which provides that in cases of higher homicide accused shall "have process to summon such witnesses as are necessary to his defense at the expense of the state," and sec. 4062, Stats. (1898), that upon satisfactory proof of a defendant's inability to procure the attendance of witnesses for his defense the court may direct necessary witnesses to be summoned, and that witnesses so ordered shall be paid their fees out of the county treasury. All witnesses in a criminal case, whether for prosecution or defense, must attend without payment of their fees in advance. Sec. 4058, Stats. (1898). Whether the constitutional provision or sec. 4641 can be construed to guarantee anything more than the mere process sufficient to compel the attendance of the witnesses for defendant, namely, to impliedly provide that they shall be paid their fees at public expense, is a question upon which this court has not spoken. Similar words have received the more limited construction in *State v. Hornsby,* 8 Rob. (La.) 554, 41 Am. Dec. 305. If the more liberal construction be accorded these provisions or either of them, it carries with it by necessary implication the necessity of supervision of that right to prevent its abuse. Sec. 4641 only entitles a defendant to process to summon "such witnesses as are necessary," and the uniform practice in the circuit courts has, we think, been confirmatory of the implication that, before process can issue for any witness, the court or judge must be satisfied, presumably by affidavit, that he is necessary and shall order process to compel his attendance. Nowhere in the statute is there any provision for the pay-

ment of a defendant's witnesses, except in sec. 4062, Stats. (1898), which permits witnesses "ordered" for the defendant by the court or judge to be paid their fees out of the county treasury in the same manner that witnesses for the state therein are paid; that is, only upon a certificate of the clerk of court (sec. 4060) after a prior order by court or judge. This is a necessary prerequisite to the existence of any liability of the county therefor. *Oneida Co. v. Tibbits,* 125 Wis. 9, 102 N. W. 897. The complaint fails to allege either any order of court or judge for the appearance and attendance of plaintiff, and the form of procedure, in presenting his claim to the county board, at least impliedly negatives the issue of any certificate by the clerk of court. Without such prerequisites no cause of action, even for the amount of the statutory fee, can be stated. We therefore conclude that the complaint fails to state any cause of action against the county.

By the Court.—Order appealed from is affirmed.

WASHINGTON COUNTY, Appellant, vs. SCHRUPP, Respondent.

April 2—April 20, 1909.

Courts: Jurisdiction: Claims for maintenance of insane persons: County courts: Circuit courts.

1. A county court, having appointed a guardian of an insane person who has qualified and is acting as such, has jurisdiction adequate, complete, prompt, and efficient to adjudicate claims for the support and maintenance of the ward, and it is not error for the circuit court to refuse to exercise original jurisdiction in such matters.
2. Sec. 600, Stats. (1898), does not authorize the bringing of an original action in the circuit court to enforce claims for the support and maintenance of insane persons, nor provide an independent remedy by action in the circuit court to the exclusion of the jurisdiction of the county court in such matters.

APPEAL from a judgment of the circuit court for Washington county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

This is an appeal from a judgment dismissing the complaint and awarding costs against the plaintiff. The action was brought by the county of *Washington* to recover for the support and maintenance of the defendant in its asylum for the insane and for the clothing furnished by the county to the defendant while he was an inmate of the asylum. The period covered by the claim is from June 30, 1901, to December 22, 1907. The undisputed facts on this appeal are that the defendant was adjudged to be insane in the year 1884, was committed to the Northern Hospital for the Insane in 1899 thereafter, but prior to June 30, 1901, was transferred as an incurable patient to the insane asylum of the plaintiff county, and has been supported and maintained in this asylum continuously to the time of the commencement of this action. The county claims that the necessary support, maintenance, and care it so furnished to the defendant are reasonably worth the sum of $1,039.65 and that such sum is due the county therefor. It appears that in the year 1892 one Henry P. Schmidt was duly appointed and qualified as general guardian of the defendant as an insane person and of his estate, and that he has ever since been and now is his general guardian and is performing the duties and exercising the rights of such guardian. This action was commenced by the district attorney of the county pursuant to a resolution duly adopted by the county board directing him to commence an action against the defendant for the recovery of the amount alleged to be due the county on this claim for the support and maintenance of the defendant in plaintiff's asylum.

H. A. Sawyer, for the appellant.

For the respondent there was a brief by *Austin, Fehr & Gehrz,* and oral argument by *G. A. Gehrz.*

SIEBECKER, J. The circuit court refused to entertain jurisdiction of the action for the reason that jurisdiction for the enforcement of plaintiff's claim has been granted to the county court and the circuit court should therefore decline jurisdiction in the matter. Sec. 2443, Stats. (1898), provides that "the jurisdiction of the county court shall extend . . . to the appointment of guardians to minors and others in the cases prescribed by law" and to the management of their estates. The provisions of sec. 3976 and subsequent sections of ch. 170, Stats. (1898), clearly confer power on county courts for the management and administration of the estates of insane wards and for making provision for their main tenance and support. They make ample provision for applying the ward's estate to his needs and for care of him in his dependent condition, and provide that the guardian may settle all of his accounts, "demand, sue for, collect and receive all debts due to him, or may, with the approbation of the county court, compound and discharge the same on receiving a fair and just dividend from the debtor's estate," and likewise, "with the approval of the county judge, adjust, compromise and discharge any and all claims for damages," and in cases of the ward's insolvency may proceed to a settlement of the debts as in cases of deceased persons. The provisions of sec. 3995*b*, Stats. (1898), are specially significant as showing the legislative purpose to confer ample jurisdiction on county courts to enable them to administer and adjudge in all matters pertaining to the ward's property, liabilities, and claims. It provides a proceeding for an examination and adjustment of claims and demands against him, which may be commenced by his guardian or creditors upon the notice therein prescribed, for the rendition of judgment thereon and the enforcement of the same, and, after such proceeding has been had, that "no suit shall be commenced or maintained in any court against such ward upon any such claim as the county court has exclusive jurisdiction of in the

settlement of the estates of deceased persons." The manifest intent of this extension of the jurisdiction of the county courts in guardianship matters is to clothe them with the power to manage and to finally settle and adjudicate all matters pertaining to a ward's property rights, his liabilities and claims, and to provide for his care and maintenance. The jurisdiction thus conferred is in its nature and scope like that conferred on the county courts for the administration of the estates of deceased persons. The jurisdiction is concurrent with that of the circuit courts. *Glasscott v. Warner*, 20 Wis. 654; *In re Klein*, 95 Wis. 246, 70 N. W. 64. The principle that the circuit court in matters pertaining to the administration of the estates of deceased persons should not exercise its original jurisdiction in matters wherein the county court is proceeding, unless it appears that the county court cannot grant relief as adequate, complete, prompt, and efficient, is well recognized. *Meyer v. Garthwaite*, 92 Wis. 571, 573, 66 N. W. 704; *In re Klein, supra; Burnham v. Norton*, 100 Wis. 8, 12, 75 N. W. 304. The principle is equally applicable to matters of guardianship, in which jurisdiction has been extended to the county courts. We discover nothing in the case which cannot be adequately, efficiently, and expeditiously adjudicated in the county court. In sec. 604*q*, Stats. (1898), the legislature has made specific provision for the examination, settlement, and adjudication of this and other like claims.

It is contended that sec. 600, Stats. (1898), expressly authorizes the bringing of an action in the circuit court to collect the alleged claim from the property of the defendant. The context of the section does not warrant this interpretation. It provides that the several district attorneys shall, under the direction of the county boards, sue for and collect such claims from the property of the inmates of the asylums. This statute in no sense provides that this is an independent remedy by an action in the circuit court to the exclusion of

the jurisdiction of the county court above pointed out. It prescribes how such a claim may be proceeded on for its collection whenever it is appropriate to proceed in the circuit court, but no such case is here presented.

The circuit court properly awarded judgment declining to take jurisdiction of the matter.

By the Court.—Judgment affirmed.

FRANCK, Respondent, vs. STOUT and another, Appellants.

April 2—April 20, 1909.

Landlord and tenant: Contract to insure: Breach: Measure of damages: Evidence: New trial: Newly discovered evidence: Cumulative evidence: Pleading: Amendment: Withdrawal of count: Costs: Discretion.

1. On breach by the lessee of a contract to keep the premises insured for a specified amount, the measure of damages is the loss sustained by the lessor, not exceeding the amount agreed upon.
2. When a lessee fails to keep the premises insured according to contract, it is not the duty of the lessor, in order to minimize the loss, to procure the insurance and charge the premium to the lessee, unless the lessee has refused to procure insurance. The mere fact that he allowed a policy to be canceled is not sufficient.
3. In an action by a lessor against the lessee for breach of a contract to keep the premises insured, evidence of financial aid rendered the lessor by the lessee during the term is irrelevant and raises collateral issues.
4. A new trial should not be granted for newly discovered evidence which is merely cumulative.
5. The allowance of costs on the withdrawal by plaintiff of one cause of action is within the discretion of the trial court.

APPEAL from a judgment of the circuit court for Taylor county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

This action was brought to recover damages for breach of

an agreement in an oral lease to defendants of plaintiff's sawmill whereby defendants agreed to keep the same insured during the term of the lease in the sum of $800 for the benefit of the plaintiff. The complaint contained a second cause of action for material furnished, but this cause of action was withdrawn upon the trial. Defendants denied the agreement to keep the premises insured. The property was destroyed by fire. There was a verdict in favor of the plaintiff in the sum of $800, with interest. After motion to set aside the verdict and for a new trial was denied, judgment was rendered in favor of the plaintiff upon the verdict, from which this appeal was taken.

The cause was submitted for the appellants on the brief of *Herman Leicht*, and for the respondent on that of *Barry & Barry*.

KERWIN, J. The evidence tends to prove that the defendants agreed to keep the property of plaintiff insured for his benefit in the sum of $800, took out a policy for $800 for the benefit of plaintiff, which was canceled, and failed to procure other insurance, and that the property was destroyed by fire and plaintiff sustained damages in consequence of such fire in the sum of $800. The defendants seek to reverse the judgment for alleged errors committed on the trial.

1. The appellants assign error upon the following instruction:

"The measure of damages on breach of this covenant or condition is the loss sustained by the landlord, not exceeding the amount of the insurance tenants covenanted to procure. This is the law you should use on arriving at your verdict. . . . If you find and believe from the whole evidence by a fair preponderance thereof that it is a fact that the plaintiff—*Franck*—leased to the defendants—*Stout* and *Robinson*—the premises described in his complaint, and that the defendants were to pay a certain amount for the use of the premises, and also agreed to keep the same insured while the

defendants were occupying the said premises under said lease as tenants of the plaintiff, and that the property which the defendants agreed to insure was destroyed by fire while the defendants were occupying the same under the lease, then your verdict must be a verdict in favor of the plaintiff and against the defendants for the sum of $800, with interest at the rate of six per cent. from the 15th day of July, 1907."

The objection to this instruction is that it gave the jury a wrong rule of the measure of damages, in that the jury should have been instructed that if the plaintiff had knowledge of the fact that there was no insurance on the property it was his duty to procure such insurance if he had sufficient time and could reasonably do so. This rule is invoked under the doctrine that when plaintiff had knowledge of the breach he was bound to mitigate the damages by procuring insurance, charging the premiums paid to defendants, and thus mitigate damages. But the difficulty with the appellants' contention under this head is that they have not made a case which would entitle them to invoke the rule of law which they claim applies. Whether appellants would be entitled to an instruction along the lines contended for had there been evidence that the appellants did not intend to further carry the risk, and so notified respondent, a different question would be presented. Whether in such case the plaintiff would be bound to insure in order to miminize damages we need not consider, because such a case is not made by the evidence. There is in this case no evidence of a breach sufficient to warrant plaintiff in procuring insurance and charging the premiums to defendants. The evidence merely shows that the policy was canceled and that the insurance company refused to carry the risk at the rate charged in the policy. So far as the proof shows, the defendants may have preferred to carry the risk themselves than to pay the high premium required. At least until there was a breach on the part of defendants which would justify plaintiff in procuring insurance at the expense

of defendants, plaintiff was, under the agreement, under no obligation to procure insurance. The record is wholly barren of any evidence which would entitle the appellants to the instruction which they contend for. So far as the evidence shows, the appellants may have intended to secure insurance as soon as practicable. They were insurance agents and in better position to procure it than plaintiff. There is no evidence brought home to plaintiff that they did not intend to do so or to carry the risk themselves until they procured insurance. There was no error in the instruction given.

2. Error is assigned on the exclusion of evidence offered by appellants respecting financial aid rendered to plaintiff in matters not connected with the issues in the case, and various acts of kindness by financial aid for the purpose of corroborating the claim of defendants that the policy was not taken out for the benefit of plaintiff by force of a contract to do so, but as an act of kindness on the part of defendants. It will be seen at once that the issues raised by this class of evidence were collateral to the main issue and bore only remotely thereon, and would greatly tend to divert the attention of the jury from the principal issue and raised a multitude of collateral issues. Such testimony is obnoxious to the rule requiring the evidence to correspond with the allegations and be confined to the point in issue. 1 Greenl. Ev. (15th ed.) §§ 52, 448. If the defendants were permitted to offer this class of evidence, the plaintiff, of course, should have been permitted to rebut it, and in this way collateral issues would have been raised to the great embarrassment of the main issues in the case. We find no prejudicial error in the exclusion of evidence.

3. Error is assigned on the denial of motion for a new trial. This error is based on the alleged errors already considered and because of newly discovered evidence. The alleged newly discovered evidence was cumulative, and no error was committed in denial of a new trial on that ground.

4. It is also claimed that error was committed in not imposing costs upon plaintiff on withdrawal of his second cause of action. The matter of imposing or denying costs on such withdrawal was clearly within the discretion of the trial court, and we find no abuse of discretion in that regard. We find no reversible error in the record.

By the Court.—The judgment is affirmed.

HAYNES and others, Appellants, vs. KENOSHA ELECTRIC RAILWAY COMPANY, imp., Respondent.

January 8—May 11, 1909.

Street railways: Contracts: Construction: Mortgages: Property included: Construction contract: Ownership of material: Consideration for bond issue: Corporations: Stocks: Bonds: Illegal issue: Validity: Statutes: Construction: Foreclosure: Judgment.

1. Under a contract with a street railway company for construction of its track whereby the railway company is to pay the actual cost of completing its line, plus fifteen per cent. to cover the work of engineering and supervision by the contractor, settlement to be made each month, the contractor is in effect the agent and employee of the railway company.
2. As to materials that are affixed to and made a part of a street railroad which is subject to a mortgage, both present and future property will be subject to the lien of such mortgage in favor of *bona fide* mortgage bondholders, in superiority to any contract between the vendor of the materials and the railway company.
3. After a construction company, under a contract with a street railway company whereby it was to furnish all material and labor in building the railroad line at actual cost thereof, plus fifteen per cent. for engineering and supervision, had completed part of the work and delivered materials upon the ground, it was discovered that the franchise for the operation of the street railway was invalid. Thereupon the railway company agreed to give A., who controlled both companies, money and bonds substantially equal to the amount due the construction company, A. agreeing to save the railway company harmless under

its contract, which was silent as to the ownership of the road as constructed or as to the ownership of the material delivered, and made no provision for the acceptance of the work when completed. *Held*, that the transaction, in legal effect, was had between the two corporations, vested the title to the partially completed track in the railway company, and was sufficient consideration to support the bonds issued.

4. Stock or bonds issued in violation of the provisions of sec. 1753, Stats. (1898), may be validated by paying a full consideration therefor without surrender and without reissue.

5. Sec. 1753, Stats. (1898), does not require that payment of the consideration must be contemporaneous with the issue of stock or bonds, and hence where stock or bonds are issued on a supposedly valid consideration, and it transpires that the consideration has failed, they may be validated by the subsequent delivery of the required consideration.

6. Where a street railway company, operating under a supposedly valid franchise, but which was afterwards declared invalid, issued its bonds to a construction company to the amount in value of labor and material wrought into its property, the benefit of which was used and appropriated by a successor street railway company, on foreclosure the fair and reasonable value of such labor and material to the successor company, to that amount and no more, is a lien upon the property of the successor company, prior to any lien originating subsequent to the recording of the mortgage securing such bonds, to satisfy which the whole property of the successor company may be adjudged sold.

APPEAL from a judgment of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Reversed.*

This action is brought to foreclose a trust deed given by the Kenosha Street Railway Company to secure a bond issue of $1,500,000, the bonds bearing date November 1, 1901. The plaintiffs assert that they are the owners and holders of such bonds to the amount of $29,000. Three defenses were pleaded in the answer: (1) The bonds sued on were void, under sec. 1753, Stats. (1898), because the obligor had never received seventy-five per cent. of the par value thereof in money, labor, or property; (2) no consideration was paid by the plaintiffs to their assignor, B. J. Arnold, for said bonds;

(3) the bonds were assigned to the plaintiffs by said Arnold under and in pursuance of a lobbying contract and were therefore void. Only the first ground of defense was relied upon on the trial and it is the only defense insisted upon on appeal. Answers were interposed by the *Kenosha Electric Railway Company* and B. J. Arnold only, and as to Arnold the action was dismissed before judgment was entered. The *Kenosha Electric Railway Company* prevailed on the trial in the circuit court, and the plaintiffs appeal from a judgment dismissing the complaint.

On July 2, 1900, the common council of the city of Kenosha passed an ordinance, numbered 240, purporting to grant to the plaintiffs *Haynes* and *Clausen* a franchise for the construction of a street railway in the city of Kenosha. On July 26, 1900, an action was commenced by one Allen in the circuit court for Kenosha county against *Haynes, Clausen,* and Arnold to enjoin the construction of a street railway under said ordinance. On August 10, 1900, the Kenosha Street Railway Company was incorporated with a capital stock of $25,000. On August 15, 1900, the Kenosha Street Railway Company entered into a contract with the Arnold Electric Power Station Company to design, equip, and construct a street railway in accordance with said ordinance No. 240. By the terms of this contract the construction company was to receive from the street railway company "the actual cost to the Arnold Company of all labor, superintendence, and material of every character entering into the construction of the road . . . plus fifteen per cent., said percentage to be the profit of the said Arnold Company for engineering and constructing the road." Soon after this contract was made work was begun in pursuance thereof, and continued with more or less regularity until April, 1902, at which time work had been performed and materials furnished by the Arnold Company to the amount of and value of $47,513.83. The contract provided that "settlement for said

work [was] to be made upon the 5th of each month for all material delivered and labor performed and other expenses incurred by the Arnold Company on the work during the previous month in cash or other payment satisfactory to the Arnold Company."

On January 9, 1901, the circuit court for Kenosha county decided, in the suit of *Allen v. Clausen,* 114 Wis. 244, 90 N. W. 181, that said ordinance No. 240 was void, and judgment was entered accordingly, from which judgment an appeal was taken to this court. On October 19, 1901, the common council of the city of Kenosha passed an ordinance amending said ordinance No. 240 by including some additional streets or portions of streets not included in the original ordinance. The amended ordinance also ratified the assignment of ordinance No. 240 to the street railway company. On October 21, 1901, *Haynes* and *Clausen* assigned their rights, if any they had, under ordinance No. 240 to B. J. Arnold, and on the same date Arnold in turn assigned such interest to the street railway company. On December 4th the bond issue was authorized by the street railway company, and upon said date the stockholders and directors of that company passed a resolution reciting the necessity for purchasing the franchise granted to *Haynes* and *Clausen,* and authorized the directors to purchase the same for such sum as they found practicable, not exceeding $50,000. The trust deed was recorded March 24, 1902. On March 25, 1902, Arnold delivered the bonds in suit to the plaintiffs, and on the trial he testified that they were delivered in payment for the assignment of the franchise granted by ordinance No. 240. On April 22, 1902, the case of *Allen v. Clausen* was decided by this court (114 Wis. 244, 90 N. W. 181), in which it was held that ordinance No. 240 was void because the grant was made to individuals instead of to a corporation. On May 5, 1902, the directors of the Kenosha Street Railway Company passed a resolution reciting that said company had never paid any-

thing on account of construction, and that none of the work, materials, construction, and equipment covered by the contract had been delivered to or accepted by the street railway company; that said company had lost its franchise by reason of the decision of the supreme court in the case of *Allen v. Clausen* and was unable to proceed, and that to save itself from greater damage it was advisable to procure the construction contract to be canceled. The resolution further recited that Mr. Arnold had offered to save the company harmless from said construction and equipment contract and from all loss, costs, damages, and payments thereunder and growing out thereof, upon payment and delivery to him of $16,000 in money and $30,000 in bonds of the company, and it was resolved that such offer be accepted and that certain bonds therein described be delivered to Mr. Arnold. The bonds described in this resolution were the identical bonds that had heretofore been delivered to Mr. Arnold and had been by him transferred and delivered to the plaintiffs in this action on March 25, 1902, and no other bonds were ever issued by the Kenosha Street Railway Company. The $16,000 provided for in the resolution was turned over to and was received by Mr. Arnold.

On June 2, 1902, the common council of the city of Kenosha passed an ordinance granting to the *Kenosha Electric Railway Company,* a Wisconsin corporation, a franchise to construct a street railway in said city. Thereafter the Arnold Electric Power Station Company proceeded to construct a street railway for the *Kenosha Electric Railway Company,* using as part of such construction the work done and materials furnished under the contract with the Kenosha Street Railway Company. The line was completed for the *Kenosha Electric Railway Company* in March, 1904. The defendant B. J. Arnold owned practically all of the capital stock of the Kenosha Street Railway Company and dominated and controlled that company. He likewise owned a ma-

jority of the capital stock of the Arnold Electric Power Station Company and dominated and controlled the affairs of that company. He also owned practically all of the capital stock of the *Kenosha Electric Railway Company* prior to the year 1906, and dominated and controlled the affairs of that company until 1906.

For the appellants there was a brief by *Wegner, Blatchley & Gilbertson,* attorneys, and *F. M. Lowes* and *Spencer Ward,* of counsel, and oral argument by *Mr. Andrew Gilbertson, Mr. A. H. Blatchley,* and *Mr. Lowes.* They contended, *inter alia,* that the plea of usury as a defense is personal to the borrower and his sureties and privies and cannot be set up by a stranger to the original transaction,—cannot be extended beyond the borrower, his sureties, heirs, devisees, and personal representatives. *Cheney v. Dunlap,* 27 Neb. 401, 5 L. R. A. 465, 467; *Sullivan Sav. Inst. v. Copeland,* 71 Iowa, 67, 32 N. W. 95; 2 Pom. Eq. Jur. 453; *Safford v. Vail,* 22 Ill. 327; *Essley v. Sloan,* 116 Ill. 391; *Sands v. Church,* 6 N. Y. 347; *Lilienthal v. Champion,* 58 Ga. 158, 162; *Union Nat. Bank v. International Bank,* 123 Ill. 510; *Bensley v. Homier,* 42 Wis. 631. The street railway corporation had power to borrow money and mortgage its property as security therefor. Sec. 1748, Stats. (1898); *Lehigh Valley C. Co. v. West Depere A. Works,* 63 Wis. 45; *Blunt v. Walker,* 11 Wis. 334; *Pierce v. M. & St. P. R. Co.* 24 Wis. 551; *Farmers' L. & T. Co. v. Fisher,* 17 Wis. 114; *Pfister v. Milwaukee E. R. Co.* 83 Wis. 86, 88; *Nat. F. & P. Works v. Oconto W. Co.* 52 Fed. 29; *Brownell v. Greenwich,* 114 N. Y. 518, 4 L. R. A. 685, 691. Either party may waive any part of a contract either expressly or by acts or declarations indicating a relinquishment of any provision or part of a provision, and without the performance of which, unless relinquished or waived, a recovery could not be had. *Mueller v. Cook,* 126 Wis. 504, 511; *McPherson v. Rockwell,* 37 Wis. 159; *Banbury & C. D. R. Co. v. Daniel,* 54 L. J. Ch. 265; *Ashland*

L., S. & C. Co. v. Shores, 105 Wis. 122, 132; *Goodwin v. Merrill,* 13 Wis. 658; *Clark v. Clifford,* 25 Wis. 597. A creditor treating property as belonging to the debtor and crediting proceeds on the debt is estopped to assert against the surety that the debtor was not the owner. *Thompson v. White Water Valley R. Co.* 132 U. S. 68; 20 Am. & Eng. Ency. of Law (2d ed.) 984. The vendor of railroad rails who allows them to be laid into and become an integral part of the railroad track consents thereby to their becoming subject to the lien of an outstanding mortgage upon the road, and is not entitled to be paid the purchase price in priority to the mortgage debt. *Galveston R. Co. v. Cowdrey,* 11 Wall. 459; *Porter v. Pittsburg B. S. Co.* 122 U. S. 267; *Thompson v. White Water Valley R. Co.* 132 U. S. 68; *Coe v. McBrown,* 22 Ind. 252.

John C. Slater, attorney, and *George Lines,* of counsel, for the respondents. They contended, *inter alia,* that the plaintiffs' bonds were void and that the delivery to *Haynes* and *Clausen* put the bonds beyond the control of the Kenosha Street Railway Company and constituted an issuing thereof within the meaning of sec. 1753, Stats. (1898). *Pfister v. Milwaukee E. R. Co.* 83 Wis. 86; *Nat. F. & P. Works v. Oconto W. Co.* 52 Fed. 29, 36. Sec. 1753, Stats. (1898), declares the public policy of this state with reference to the issue of corporate stocks and bonds. The object of the statute is to protect stockholders and *bona fide* creditors from the improvident issue of its bonds by the corporation, which might, and if allowed probably would, result in the wrecking of the corporation. *Pfister v. Milwaukee E. R. Co.* 83 Wis. 86, 88; *Clarke v. Lincoln L. Co.* 59 Wis. 655, 660; *First Avenue L. Co. v. Parker,* 111 Wis. 1. Objection under sec. 1753 can be raised by any one interested in the amount of the corporate capitalization or indebtedness. *Nat. F. & P. Works v. Oconto W. Co.* 52 Fed. 29; *First Avenue L. Co. v. Parker,* 111 Wis. 1; *Collart v. Fisk,* 38 Wis. 238. The ma-

terial furnished and labor performed remain the property of the contractor, and no title thereto passed to the railway company for which the chattel is being built until the completion and delivery thereof; and the rule is the same although advances are stipulated to be made to the builder from time to time as the work progresses. 30 Am. & Eng. Ency. of Law (2d ed.) 1217; *Haney v. Schooner Rosabelle,* 20 Wis. 247; *Galloway v. Week,* 54 Wis. 604; *Andrews v. Durant,* 11 N. Y. 35; *Gregory v. Stryker,* 2 Denio, 628; *West Jersey R. Co. v. Trenton C. W. Co.* 32 N. J. Law, 517; *Elliott v. Edwards,* 35 N. J. Law, 265; *Clarkson v. Stevens,* 106 U. S. 505. No amendment of a void ordinance can amount to a re-enactment thereof or be of any validity or effect in itself unless the amendment is sufficient to stand as an original act of legislation without regard to the void ordinance. McQuillan, Mun. Ord. sec. 196; *Schwartz v. Oshkosh,* 55 Wis. 490; *O'Neil v. Tyler,* 3 N. Dak. 47, 53 N. W. 434; *Harvey v. A. & G. R. Co.* 186 Ill. 283; *Roche v. Knight,* 21 Wis. 324; *Wicke v. Lake,* 21 Wis. 410; *Lego v. Medley,* 79 Wis. 211. A defendant may plead as many defenses and counterclaims as he may have, even though they are based upon inconsistent legal theories. *South Milwaukee B. H. Co. v. Harte,* 95 Wis. 592; *Gates v. Avery,* 112 Wis. 271; *Gilman v. Brown,* 115 Wis. 1; *Roberts v. Decker,* 120 Wis. 102; *J. H. Clark Co. v. Rice,* 127 Wis. 451.

The following opinion was filed January 26, 1909:

BARNES, J. In view of the conclusion reached in this case it is unnecessary to decide whether ordinance No. 240, passed by the common council of the city of Kenosha, was re-enacted or validated by the amendment of October 19, 1901, granting certain rights and privileges to the Kenosha Street Railway Company and approving of the assignment to said railway company of the franchises and rights granted plaintiffs by said ordinance. We will assume, without de-

ciding, that the bonds issued to B. J. Arnold on March 25, 1902, were void within the meaning of sec. 1753, Stats. (1898), for want of sufficient consideration to support them. The validity of $29,000 of the $30,000 in bonds so issued is involved in this suit.

The evidence in the case is undisputed that Mr. Arnold owned practically all of the stock of the Kenosha Street Railway Company (hereinafter called "railway company"), organized August 10, 1900, and that he absolutely dominated and controlled the affairs of such corporation. It is also undisputed that he held at least a majority of the stock in the Arnold Electric Power Station Company (hereinafter called the "construction company") and that he dominated and controlled the affairs of that company. It is likewise conclusively established that he owned practically all of the stock in the *Kenosha Electric Railway Company,* which was organized shortly after May 5, 1902, and that he also dominated and controlled the affairs of that company until he disposed of his stock therein during the year 1906.

Prior to May 5, 1902, the construction company had performed construction work, and delivered construction material in the streets, to the value of $47,513.83, under its agreement with the railway company. On April 22, 1902, this court decided the case of *Allen v. Clausen,* 114 Wis. 244, 90 N. W. 181, in which it was held that the original franchise granted the plaintiffs was void because the grantees named therein were individuals, while sec. 1862, Stats. (1898), authorized the granting of such a franchise to a corporation only. No part of the above sum had then been paid the construction company.

On May 5, 1902, the directors of the railway company met and adopted two resolutions. Mr. Arnold was present, but voted on neither. The first recited that, ordinance No. 240 having been declared void by the supreme court, it was expedient that the proposition of B. J. Arnold for the issue

of stock to him on account of the transfer of said ordinance, and the company's acceptance of such proposition, should be abrogated, the consideration therefor having wholly failed. Mr. Arnold testified on the trial that the sole consideration for the $30,000 in bonds issued and delivered to him was the assignment of said ordinance No. 240 by him to the railway company. It does not appear just what the agreement between the parties was in reference to the amount of stock he was to receive in addition to the bonds. Such stock was evidently intended to represent his profit on the purchase of the franchise from the plaintiffs, they having received the entire $30,000 in bonds in consideration of their assigning the franchise, according to Mr. Arnold's testimony. The second resolution recited the adverse decision of this court rendering the franchise void and that the company was unable to sell its bonds or provide money to make payments under the construction contract, so that it was necessary, in order to prevent greater loss, to procure the cancellation of such contract. The resolution then recited:

"Whereas, Mr. B. J. Arnold has this day offered to save this company harmless from said construction and equipment contract, and from all loss, costs, damages and payments thereunder and growing out thereof, provided and on condition that he be paid and allowed for so doing the sum of $46,000, payable $16,000 in cash and the balance of $30,000 in and by the delivery to him of thirty of the bonds of this company for one thousand dollars each, with all their coupons, matured and unmatured, attached: . . . Therefore be it and it is hereby resolved, that said proposition of said B. J. Arnold be and the same is hereby accepted and the officers of this company are directed to take all steps and perform all acts necessary to carry out said proposition and its acceptance."

The resolution further recited that "the thirty bonds to be allowed to said B. J. Arnold shall be bonds numbered 121 to 150, both inclusive." The company further assigned to Mr.

Arnold its rights in the sum of $5,000 on deposit with the city of Kenosha "on account of ordinance No. 240," and "$5,000 in the hands of Z. G. Simmons to indemnify him as bondsman." The $16,000 in cash referred to in the resolution was paid Mr. Arnold. The bonds to be turned over to him were the identical bonds delivered to him on March 25th and the consideration for which it was supposed had failed by reason of the franchise for which they were given having been declared void. As already stated, these bonds had passed out of Mr. Arnold's possession, and it is apparent that it was his intention, when the transaction of May 5th occurred, to take the necessary steps to supply the want of consideration for their issue and thus validate them.

The decision of the trial court was based on two grounds: (1) The street railway company received nothing of value on May 5th that would furnish a sufficient consideration for the bond issue at that time; and (2) the bonds in suit were issued prior to May 5th for an insufficient consideration and were therefore void, and could not be validated by the transaction of May 5th. In support of the first ground it is said that the work done and material furnished by the construction company, a substantial portion of which had been worked into the street railway line, never was the property of the railway company and never became such, and that therefore on May 5th, when the issue of bonds was voted, the company received no consideration and had no property or thing of value whatever. The following authorities are relied on to sustain such contention: 30 Am. & Eng. Ency. of Law (2d ed.) 1217; *Haney v. Schooner Rosabelle,* 20 Wis. 247; *Galloway v. Week,* 54 Wis. 604, 12 N. W. 10; *Andrews v. Durant,* 11 N. Y. 35; *Gregory v. Stryker,* 2 Denio, 628; *West Jersey R. Co. v. Trenton C. W. Co.* 32 N. J. Law, 517; *Elliott v. Edwards,* 35 N. J. Law, 265; *Clarkson v. Stevens,* 106 U. S. 505, 1 Sup. Ct. 200. If the position taken is sound, it disposes of the case for all practical purposes.

While the agreement on Arnold's part to indemnify the railway company against being called upon to pay the money due the construction company might furnish a sufficient consideration to support the validity of the bonds, yet, if there is no property on which the trust deed given to secure such bonds could operate, there is no security whatever for the payment of the bonds.

The authorities cited by the respondent do not seem to reach the situation here presented. Prior to the decision of this court in *Allen v. Clausen,* 114 Wis. 244, 90 N. W. 181, the railway company and the construction company evidently acted upon the assumption that the franchise granted by ordinance No. 240 was valid. It was the only authority which gave any color of right to tear up the streets and place tracks and erect poles therein, and it would appear from the evidence in the case that about one third of the construction work had been performed when the ordinance was declared invalid.

The construction contract is peculiar in its terms. It is silent as to title or ownership of the road as constructed or as to the ownership of the construction material as delivered on the ground. It made no provision for acceptance of the work on completion. Under its terms the street railway company was obligated to pay the actual cost of completing the line, plus fifteen per cent. to cover the work of engineering and supervision by the construction company. Settlement was required to be made on the "5th of each month for all material delivered and labor performed and other expense incurred . . . during the previous month in cash or other payment satisfactory to the said Arnold Company." If this contract had been carried out according to its terms, the construction company would be obliged to advance very little money of its own to carry on the work. The fact that the same person controlled both corporations rendered the acceptance of the work a merely formal matter. For the same

reason, perhaps, the advances to carry on the work were all made by the construction company, although it appeared that the railway company had over $19,000 in its treasury on May 5, 1902. The nature of the contract was such that it would seem that the construction company was employed by the railway company as its agent and employee to construct the line, receiving, as compensation for its services for engineering and supervision, fifteen per cent. of what the road otherwise cost.

The authorities are generally to the effect that, as to materials that are affixed to and made a part of a railroad which is subject to a mortgage, both present and future property will be subject to the lien of such mortgage in favor of *bona fide* mortgage bondholders, in superiority to any contract between the vendor of the property and the railroad company. *Galveston, H. & H. R. Co. v. Cowdrey,* 11 Wall. 459; *Porter v. Pittsburg B. S. Co.* 122 U. S. 267, 7 Sup. Ct. 1206; *Thompson v. W. W. V. R. Co.* 132 U. S. 68, 10 Sup. Ct. 29; *Coe v. McBrown,* 22 Ind. 252. The trust deed that is being foreclosed in this suit, in express terms covered after-acquired property.

Aside from the foregoing considerations, and regardless of where the title to the improvements made and the materials furnished vested prior to May 5, 1902, we think the transaction at that time was amply sufficient to vest the title to the property in question in the street railway company, if it were otherwise vested before.

Without any intent to use the appellation in an invidious sense, Mr. Arnold was a veritable Pooh Bah as far as the three corporations here involved were concerned. When he "met" with himself, they met if he so willed. His unhampered authority to dictate was questioned by no one. He was simply dealing with his own property through a corporate agency as absolutely as he might deal with it as an individual. We must look to his intent, to some extent, to determine just

which corporate entity owned the property we are dealing with. When he made a proposition to the railway company to save it harmless from the construction contract and also from all "loss, costs, damages and payments thereunder or growing out thereof" in consideration of $16,000 in cash and $30,000 in bonds, the construction company was in fact making the offer. He was, to all intents and purposes, the construction company. The amount to be paid was substantially the amount due the construction company. There is no proof that he was called upon to pay any "loss, costs, or damages" arising out of the contract, except as he might have paid the construction company what was due it. The resolution shows that he was empowered to collect $10,000, which had been deposited by the railway company for two different purposes, in addition to receiving the $46,000 in bonds and money. It does not appear how much was realized on such claims. No claim was made upon the railway company after May 5th for the amount then due on the construction contract, presumably because Mr. Arnold had settled with the construction company, as the arrangement entered into contemplated he should. It never thereafter asserted that the construction contract was not by mutual arrangement canceled and terminated as it was agreed it should be.

It makes very little difference whether this contract was entire or separable. If entire, the parties had a right to agree upon the amount due thereon and on the damages the contractor should be entitled to receive for surrendering his contract, if any; and on payment of such amount there was no obstacle whatever in the way of terminating such agreement. We know of no rule of law that would, in the absence of express agreement, permit a contractor to receive pay for what was due him on his contract and for damages he might be entitled to for cancellation thereof, and at the same time permit him to retain the property thus paid for. If the construction company here could receive $46,000 in payment for

all sums due upon the contract and could voluntarily agree to a termination of such contract, and in addition thereto could keep the property represented by the payment, we would have an apt illustration of how it is possible to eat cake and keep it at the same time. We think no such intention should be inferred from the acts of the parties, and certainly no such intent is expressed.

The obvious reply to this reasoning is that the arrangement was made between the railway company and Arnold as an individual, and that the agreement should not be treated as though made with the construction company. Neither the street railway company nor the construction company is here repudiating Arnold's authority to act for the construction company; nor are they combating the proposition that he did so act. This is a proceeding in a court of equity, that looks to substance rather than to form. Mr. Arnold testified, and his testimony is undisputed, that the construction company was an Illinois corporation "owned and controlled" by him. In view of this fact, which is a verity in the case, the rational conclusion to draw is that the arrangement of May 5th was, in legal effect, made between the two corporations. As to the effect of permitting Arnold to deal with these corporations in the manner in which he did, the following cases support the view that his acts were binding upon the corporation he assumed to act for: *St. Clair v. Rutledge*, 115 Wis. 583, 92 N. W. 234; *Northwestern F. Co. v. Lee*, 102 Wis. 426, 78 N. W. 584; *First Nat. Bank v. G. V. B. Min. Co.* 89 Fed. 439; *Quee D. Co. v. Plaut*, 55 App. Div. 87, 67 N. Y. Supp. 10; *Fitzgerald & M. C. Co. v. Fitzgerald*, 137 U. S. 98, 109, 11 Sup. Ct. 36; *Chambers v. Lancaster*, 160 N. Y. 342, 54 N. E. 707; *Nat. State Bank v. Sanford T. & T. Co.* 157 Ind. 10, 60 N. E. 699; *McComb v. Barcelona A. Asso.* 134 N. Y. 598, 608, 31 N. E. 613; *Preston Nat. Bank v. G. T. Smith M. P. Co.* 84 Mich. 364, 47 N. W. 502; *Sherman Center T. Co. v. Morris*, 43 Kan. 282, 23 Pac. 569.

From what has been said it is apparent that there was an ample consideration to support an issue of bonds to the amount of $30,000, aside from the consideration that would follow because of the payment of the debt, unless the lack of a franchise rendered the property worthless. We do not think the lack of a franchise deprived the construction work of value, and it certainly did not destroy the value of material placed upon the ground and not actually wrought into the construction. The city of Kenosha was evidently desirous that a street railway system should be installed. It granted the original franchise over the mayor's veto. It afterwards granted additions to the franchise and ratified the assignment thereof to the street railway company. The *Kenosha Electric Railway Company* was organized in May, 1902, and almost immediately secured a franchise not materially different from that originally granted. This corporation was dominated and controlled by Mr. Arnold to the same extent that the former company had been, and no doubt the new franchise would have been granted to the former company if the proper request had been made upon the city council.

It is argued, however, that if it be assumed that the railway company might have legally issued bonds to the amount of $30,000 it did not do so; that in effect it attempted to validate bonds to that amount which were already issued and delivered to Mr. Arnold; that such bonds were void for want of consideration, and, having passed out of Arnold's control, they were void for all purposes and could not be made valid obligations by supplying a new and sufficient consideration. To state the proposition in another way, it amounts to saying that, though the holders of the bonds might have surrendered them and taken other valid bonds in the same amount in their stead, yet the failure so to do has left them with worthless paper in their hands. Here again the question of substance rather than of form is involved. If the law pronounces the bonds void, however, it is just as much the duty of a court of

equity to obey its mandate as it would be the duty of a court of law to do so.

Sec. 1753, Stats. (1898), provides that:

"No corporation shall issue any stock or certificate of stock except in consideration of money or labor or property, estimated at its true money value, actually received by it, equal to the par value thereof, nor any bonds or other evidence of indebtedness except for money, labor or property estimated at its true money value actually received by it, equal to seventy-five per cent. of the par value thereof, and all stocks and bonds issued contrary to the provisions of this section and all fictitious increase of the capital stock of any corporation shall be void."

It will be observed that this section treats of corporate bonds and stocks. In the case of stock it is void unless issued in consideration of money or its equivalent to the amount of the par value of the stock. In the case of a bond it is void unless issued in consideration of money or its equivalent to the extent of seventy-five per cent. of its par value. It is very obvious that the lawmaking power did not use the word "void" in this statute, as applied to stock, in the sense that stock once issued in violation of its provisions could not be validated by paying a full consideration therefor. Secs. 1751, 1754, 1756, Stats. (1898), wherein provision is made for collecting the difference between the amount paid and the face value of stock issued, negative any such construction.

It is difficult to imagine any greater infirmity in the stock of a corporation than would result from overissue. Such stock is wholly void. But it seems that overissued or spurious stock may be legalized by a subsequent legal increase of the capital stock of the corporation. *In re New Zealand B. Corp.* L. R. 3 Ch. App. 131; 1 Cook, Corp. § 292. And it is held that where spurious stock is issued, if there is an after surrender of an equal amount of valid shares, made for the purpose of validating the spurious shares, they thereby become valid. *Perin v. C., N. O. & T. P. R. Co.* 18 Weekly

Law Bul. 382; *Cincinnati, N. O. & T. P. R. Co. v. Citizens' Nat. Bank,* 24 Weekly Law Bul. 198. Judge TAFT participated in the first of these decisions and wrote the second. See further collation of cases under sec. 766, 3 Cook, Corp. (5th ed.) 2016 *et seq.*

It is difficult to see why the word "void" in sec. 1753 means one thing when applied to stock and something different when applied to bonds. And if stock, void because the statutory requirement as to consideration has not been complied with, can thereafter be validated without surrender and without reissue, by supplying such consideration, no good reason is apparent why the same rule should not apply in the case of bonds.

The New York statute inhibits the issue of bonds "for less than the fair market value thereof." Where bonds to the amount of $10,500 were pledged to secure an indebtedness of $6,415 and in contemplation of further loans being made, with an agreement that the pledgor might sell the bonds at face and pay the loan with the proceeds, and loans were thereafter made to the face value of the bonds, it was held by the United States circuit court of appeals that the bonds were lawfully issued within the meaning of the statute. *In re Waterloo O. Co.* 134 Fed. 345. The validity of the bonds was not sustained on the ground that the $6,415 represented their "fair market value," but because the bank actually advanced money thereon to the amount of their face value.

Sec. 1753 does not in terms provide that the payment of the consideration must be contemporaneous with the issue of the bonds. In this case, in the first instance, a supposedly valid consideration was given by the party to whom the bonds were issued. He transferred them to third parties. Six weeks later, when it transpired that the consideration had failed, or the parties so supposed, he substituted other and sufficient consideration therefor. We conclude that the issue

of the bonds was validated by the payment of such consideration. Having reached such conclusion, it is unnecessary to consider the application of sec. 1753, Stats. (1898), to *bona fide* holders of bonds received in due course of business, or whether the plaintiffs are holders in due course, and neither is it necessary to discuss numerous other questions argued by appellants.

Our conclusions are: (1) That the construction work done and the material furnished and delivered under the construction contract became and were the property of the Kenosha Street Railway Company from and after May 5, 1902; (2) that the lien of the trust deed sought to be foreclosed in this action attached to such property and is now a valid, outstanding, and subsisting lien against the same; (3) that such lien, as to such portions of said railroad as had been wholly or partially constructed prior to May 5, 1902, is prior and paramount to any right, claim, or interest of the *Kenosha Electric Railway Company* in or to such portions of said railroad; (4) that the plaintiffs are entitled to the usual judgment of foreclosure and sale in this action.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

Upon a motion for a rehearing there was a brief by *Wegner, Blatchley & Gilbertson,* attorneys, and *F. M. Lowes* and *Spencer Ward,* of counsel, for the appellants, and a brief by *Quarles, Spence & Quarles,* of counsel for the respondent.

The following opinion was filed May 11, 1909:

BARNES, J. A motion for a rehearing is filed in this case, in which the court is asked to be more specific in its designation of the property which is to be subjected to the lien of the mortgage sought to be foreclosed.

The practical difficulty in making a severance of the prop-

erty now operated by the *Kenosha Electric Railway Company* seems almost insurmountable, and if severance were made the plaintiffs might receive very little on a sale of the property. Besides, the interest of the public in having street-car service maintained is important and should not be overlooked. On the other hand, it did not seem to be equitable to the defendant, the *Kenosha Electric Railway Company,* under the circumstances, to declare the mortgage a lien on its entire road, regardless of the value to it of the work done and materials supplied by the former company. This being a proceeding in a court of equity, it is within the power of the court to dispose of the case on equitable considerations.

The former mandate is modified in the following particulars: The circuit court is directed to ascertain the fair and reasonable value to the *Kenosha Electric Railway Company* of the work done and materials furnished by the Kenosha Street Railway Company and the Arnold Electric Power Station Company, the benefit of which was used and appropriated by said *Kenosha Electric Railway Company.* Said circuit court is further directed to declare the indebtedness found to be due said plaintiffs upon the bonds and mortgage sued upon a lien upon the real property of the *Kenosha Electric Railway Company,* to the amount of the value so found and no more, which lien shall be prior to any lien originating against said property subsequent to the recording of the mortgage sought to be foreclosed in this action, and to satisfy which a sale of the property should be ordered and directed. If it is essential to bring in other necessary parties so that they may be concluded by the judgment, the court will make the necessary order requiring such parties to be made defendants in the action.

By the Court.—It is so ordered.

WINSLOW, C. J., took no part.

AVENARIUS, Respondent, vs. KORNELY, Appellant.

January 26—May 11, 1909.

Trade-marks and trade-names: Names subject to ownership: Infringement: Actions: Expiration of patent: Effect: Abandonment: Nature of right: Evidence: Foreign trade-marks: Registry in United States: Protection: What law governs: Laches.

1. The exclusive right to use words, letters, or symbols to indicate merely the quality of goods to which they are affixed cannot be acquired, unless the primary object of the trade-mark be to indicate origin or ownership.
2. The rule that a name cannot be a trade-mark or trade-name only applies when the name is used to describe the kind or quality of the thing sold and not the article of a particular maker or seller.
3. A trade-mark which in its original signification or by association distinctly points to the origin or ownership of the article to which it is applied will be protected, while a generic or geographical name, designating a city or district or country, or merely descriptive of the article, and which may be employed with truth by others, is not entitled to legal protection as a trade-mark.
4. An inventor of a wood-preserving paint called it "Carbolineum," and either alone or with other indicia continuously affixed that word to the receptacle containing the product in which it was sold. It was a word coined by the inventor and unknown when first used, and was thereafter always used as the inventor's trade-mark to designate his invention, and not as descriptive of the article manufactured. *Held*, that such word was a valid trade-mark.
5. Newly coined words are, as a general rule, sustained as proper trade-marks, since such words, being generally meaningless, cannot be either descriptive or deceptive.
6. Where a product is manufactured and the compound is a secret invention, the inventor may coin a new name for his product by which it is to be known, and is entitled to protection of such trade-mark or trade-name against an objection that thereby the name became *publici juris*.
7. A valid trade-mark may consist of some novel device, arbitrary character, or fancy word applied without special meaning, which by use and repetition comes to serve the same purpose. Such words and devices indicate sufficiently the true source

and origin of the goods without particular addition of the name of the manufacturer or dealer.

8. Actions to restrain the infringement of trade-marks are based on the doctrine that the law will not allow one person to sell his own goods as and for the goods of another. This is to prevent not alone fraud upon private rights but upon the public as well.

[9. *It seems* that where one owning a newly patented product gives it a name, such name becomes *publici juris* on the expiration of the patent.]

10. Where a trade-mark antedated a patent covering the product to which the trade-mark was applied by about twelve years, the expiration of the patent in no way affects the trade-mark.

11. Evidence that a word was constantly used as a trade-name, that the owner applied for its registration in various foreign countries and was diligent in his efforts to protect it as his trade-name, and that he subsequently used his own name in connection with such word and registered the same in the United States Patent Office, sustains a finding that such owner never abandoned such word as a trade-name.

12. One is not confined to one form of his trade-mark.

13. Registration neither creates nor destroys rights in a trade-mark. Such rights are not created by act of Congress and do not depend upon it for their enforcement, but upon priority of appropriation.

14. An owner of an original trade-mark will be protected in the exclusive use thereof, and, to constitute an infringement, it is not necessary that every word of the trade-mark should be appropriated. It is sufficient that enough be taken to deceive the public in the purchase of the protected article.

15. In an action to enjoin the use of a foreign trade-mark it is immaterial whether the owner could or could not have registered it in foreign countries under their laws. The question is whether the claim to protection is in harmony with the law, written or unwritten, of this country.

16. One is to be protected in his trade-mark or trade-name against another who, with intent to deceive, has appropriated such trade-mark or trade-name for his own benefit and to the owner's damage, although there is no material difference between the products of each.

17. One is not guilty of laches in protecting his trade-mark who, claiming rights thereby, has always been diligent in his endeavors to protect it, and had applied for registration thereof in the United States before it had been used by any other person for any purpose.

TIMLIN, DODGE, and BARNES, JJ., dissent.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

This action was brought to restrain the alleged unlawful use of the plaintiff's trade-mark or trade-name "Carbolineum." The court below sustained the plaintiff's claim and rendered an interlocutory judgment enjoining the defendant from selling his goods under the plaintiff's trade-mark or trade-name "Carbolineum" or any word in imitation thereof. The appeal in this action is from such interlocutory judgment. The court below found as follows:

(1) That said plaintiff is now, and was at all the times hereinafter mentioned, a resident and citizen of the German Empire.

(2) That on December 11, 1871, a treaty was concluded between the United States and the German Empire [17 U. S. Stats. at Large, 921], which treaty has been at all times hereinafter mentioned, and is now, in force between said countries, and which said treaty provides: "Art. XVII. With regard to the marks or labels of goods, or of their packages, and also with regard to patterns and marks of manufacture and trade, the citizens of Germany shall enjoy in the United States of America, and American citizens shall enjoy in Germany, the same protection as native citizens."

(3) That said plaintiff is engaged, and since the year 1876 has been continuously engaged, in the manufacture and sale of wood-preserving paint and liquids, to wit, a high distillate of coal tar, under the firm name and style of Gerbrueder Avenarios, or Avenarius Brothers.

(4) That during all said time said plaintiff has continuously called his said product by the name of "Carbolineum," and has continuously affixed said name, either alone or in connection with other words and indicia, to the cans, barrels, and receptacles containing the same, and still continues so to do, and during all said times has sold and marketed his said product under said name, and so marked with said name, in large quantities in Germany and in other European countries.

(5) That said word "Carbolineum" was coined and originated by said plaintiff in analogy to the two Latin words "carbo," meaning coal, and "oleum," meaning oil.

(6) That at the time said plaintiff so first used said word "Carbolineum" the same had not been used by any other person for any purpose and was wholly unknown.

(7) That in the year 1886 said plaintiff first shipped his said product under said name and so marked with said name to the United States, and has ever since said year sold and marketed the same under said name and so marked with said name in large quantities in said United States.

(8) That said plaintiff has widely advertised his said product by said name and designation of "Carbolineum" since the year 1876 in Europe and since the year 1886 in the United States, and that his said product has become widely and favorably known during said time in all said countries under said name and designation as a valuable and useful article of merchandise, and that said reputation and sale of his said product under said name and designation has been of great benefit and advantage to said plaintiff.

(9) That during all said time of plaintiff's said use of said word, both in said European countries and in the United States, said plaintiff has claimed and intended said word as his trade-mark, and as a specific name and designation for his said product, to indicate that the article to which the same was so applied and affixed was the manufacture of said plaintiff, and that said plaintiff has relied upon said name and designation to distinguish his said product with the public and to indicate its origin, and that his said product is so distinguished with the trade by said name and designation as thus indicating its origin.

(10) That, in accompanying said word "Carbolineum" with said other words and indicia upon the cans, barrels, and receptacles containing his said product, said plaintiff did not intend to abandon or surrender, and did not abandon or surrender, any of his claims or any of his rights to said word "Carbolineum" alone as his trade-mark or his intended trade-mark upon his said product.

(11) That on October 13, 1886, said plaintiff duly applied to the Patent Office of the United States for the registration of said word "Carbolineum," and that the same was pursuant to said application duly registered in said office on the 8th day of February, 1887, as his trade-mark for preservative liquids, as No. 14,048 of trade-marks; that on

April 19, 1889, said plaintiff applied to the Patent Office of the United States for the registration of the words "Carbolineum Avenarius," and that the same were, pursuant to said application, duly registered in said office on the 9th day of July, 1889, as his trade-mark for preserving paint, as No. 16,788 of trade-marks.

(12) That the word "Carbolineum" was first used in Germany, and under the then existing laws of that country it was not and could not become a trade-mark, and the plaintiff could not prevent competitors from using said word as a designation for their similar products.

(13) That the plaintiff procured a patent from the German Empire for a part of the process of manufacturing his said product.

(14) That since the year 1893 the defendant has been and continues to be engaged in the sale of wood-preserving paint and liquids, to wit, a high distillate of coal tar.

(15) That plaintiff has abandoned his contention that defendant's said product is inferior to that of plaintiff, but the court finds that said two products differ materially from each other.

(16) That the defendant has bought all of said wood-preserving paint and liquid which he has sold from his uncle, George Presser of Gau-Algesheim, who manufactured and sold the same to said defendant, and who in his correspondence with said defendant called the same "Carbolineum Presser," but who did not affix said word "Carbolineum" to the receptacles in which he sold the same to said defendant; that said defendant first called said preparation "Presser Preservatine," and continued until the year 1903 to use said name on part of the receptacles in which he sold the same; that said Presser requested said defendant to use the name "Carbolineum" for said preparation, and informed him that he had a right thus to use said word; that in 1900 or 1901 said defendant began to use the words "Original Carbolineum" with reference to said preparation on his stationery; that in 1902 said defendant called his said preparation "Preservatine, the Original Carbolineum," in a newspaper advertisement appearing in the Milwaukee Sentinel, and upon some advertising calendars, and began to use labels bearing said name upon pint and quart cans in which he sold

said preparation, but continued to label the larger receptacles in which he sold the same with the words "Presser Preservatine;" that in the latter part of 1903 said defendant began to use labels, stationery, and advertising pamphlets in which he called said preparation "Carbolineum Preservatine," and on said stationery announced that his said preparation was the "oldest on the market;" that late in 1903 or early in 1904 said defendant began extensively to advertise said preparation under said name of "Carbolineum Preservatine" in agricultural papers, poultry papers, and tanners' trade papers having large circulation, and in said advertisement announced that his said preparation was "thirty years on the market," and that defendant has continued to use said last-mentioned labels and stationery up to the time of trial in this action, and has continued up to said time extensively so to advertise his said preparation; that all said various uses of said word "Carbolineum" by said defendant have been without said plaintiff's consent; that there is no evidence that plaintiff or any one representing him knew before the year 1903 of said defendant's use of said word "Carbolineum."

(17) That a trade-mark for the aforesaid product of said George Presser was officially registered in the proper department of the German Empire on the 5th day of June, A. D. 1895, of which the following is a facsimile:

and that said trade-mark ever since has been and still is in full force and effect.

(18) That the acts of said defendant in thus using said word "Carbolineum" have been and are calculated to deceive, and do deceive, the users of wood-preserving paints and liquids into purchasing the product of said defendant as and for the product of said plaintiff in the belief that the same is the product of said plaintiff, and that said acts of said defendant were done with the intent and purpose of so deceiving said users of such products, and of thus obtaining the benefit of plaintiff's said advertising and of the reputation of his said product and the good will of his said business.

(19) That said defendant's said use of said word "Carbolineum" has been repeated and continuous and has damaged said plaintiff.

And as conclusions of law the court found:

(1) That said word "Carbolineum" denotes origin and constitutes the trade-mark of said plaintiff.

(2) That said use of said word "Carbolineum" by said defendant constitutes an infringement of plaintiff's said trade-mark and upon his rights under said trade-mark.

(3) That plaintiff has sustained damages as a result of said infringement by said defendant.

(4) That plaintiff is entitled to the relief demanded in his complaint.

(5) That all patents obtained by said plaintiff in respect to his said product have expired.

The defendant excepted to the findings and to the refusal to find as requested.

C. M. Scanlan and *L. C. Wheeler,* for the appellant, contended, *inter alia,* that the word "Carbolineum" could not be a lawful trade-mark for the reason that it is a descriptive word. *Linoleum Mfg. Co. v. Nairn,* L. R. 7 Ch. D. 834; *Rex v. Cruttenden,* 10 Ont. 80; *Christy v. Tipper,* [1905] 1 Ch. 1; *In re Chesebrough's Trade-mark,* [1902] 2 Ch. 1, 9, 14; Bryan, Petroleum and Nat. Gas, 9–12; *Ex parte Evans,* 96 O. G. 425; 107 O. G. 542; *Heide v. Wallace,* 135 Fed. 346; 11 O. G. 1062; 100 O. G. 2603; *Ex parte Mitchell,* 113 O. G. 1970; *Worden v. Cal. F. S. Co.* 102 O. G. 623; 21 Pat., D. & T. Cas. 569; 133 O. G. 232; 132 O.

G. 1073; 12 O. G. 939; 97 O. G. 749; *Fuller v. Huff*, 99 Fed. 439; 24 Pat., D. & T. Cas. 688; 18 Pat., D. & T. Cas. 34; 100 O. G. 1330; 100 O. G. 1976; 95 O. G. 229; 99 O. G. 2101; 99 O. G. 2321; *Sterling R. Co. v. Gorey*, 110 Fed. 372; *Searle & H. Co. v. Warner*, 112 Fed. 674; *Lamont v. Leedy*, 88 Fed. 72; *Ex parte Crescent Mfg. Co.* 97 O. G. 750. The fact that a word is misspelled does not make it a fancy word or save it from being descriptive. 24 O. G. 899; Hopkins, Trade-marks, 85; *Ex parte Hutchins*, 100 O. G. 1330; 133 O. G. 1935; 133 O. G. 231; 110 O. G. 601; 95 O. G. 1452; 132 O. G. 844; *Barrett C. Co. v. Stern*, 176 N. Y. 27; 100 O. G. 682; 97 O. G. 749; 100 O. G. 1976; 85 O. G. 453. Mutilating a word, either by leaving out letters or syllables or putting in "extra" letters or syllables, does not make it nondescriptive when, if correctly spelled, it would be descriptive. 108 O. G. 289; 20 Pat., D. & T. Cas. 337; 16 Pat., D. & T. Cas. 173. Neither does the fact that a word is in a foreign language take it out of descriptive words. Hesseltine, Trade-marks, 50; Hopkins, Trade-marks, 87–95, 114, 115; 102 O. G. 465; *Meaby v. Triticine*, 15 Pat., D. & T. Cas. 1; 86 O. G. 181; 21 Pat., D. & T. Cas. 576; 22 id. (1905) 43; *Warwich T. Co. v. Urban*, 21 Pat., D. & T. Cas. 240; 100 O. G. 450; *Dadirrian v. Yacubian*, 98 Fed. 872, 873; *Rex v. Cruttenden*, 10 Ont. 80; *Moore v. Auwell*, 158 Fed. 462; Hopkins, Trade-marks, 304, 305. The word "Carbolineum" could not be lawfully used as a trade-mark, because whenever any new thing has been invented, devised, or in any wise brought to the attention of mankind, it must be given a name, and that name may be used by everybody and cannot be a trade-mark. Hopkins, Trade-marks, 107, 111; Hesseltine, Trade-marks, 46; *Linoleum Mfg. Co. v. Nairn*, L. R. 7 Ch. D. 834; *Waterman v. Ayres*, L. R. 39 Ch. D. 29; *Rex v. Cruttenden*, 10 Ont. 80; *Leclanche B. Co. v. Western E. Co.* 23 Fed. 276; *Hostetter v. Fries*, 17 Fed. 620; *Dadirrian v. Yacubian*, 98

Fed. 872. The word "Carbolineum" could not be lawfully used as a trade-mark, since it was a word in common use prior to and at the time it was registered in 1886 and thus designated the article either by description, being its name, or expressing any quality or use of it. Hopkins, Trade-marks, 107, 244; 20 Pat., D. & T. Cas. 450; 17 Pat., D. & T. Cas. 486; *Ex parte Ams,* 23 O. G. 344; *French Republic v. Saratoga V. S. Co.* 191 U. S. 427; 107 O. G. 2238; *B. B. Hill Mfg. Co. v. Sawyer-Boss Mfg. Co.* 118 Fed. 1014, 112 Fed. 144; *Powell v. Birmingham V. B. Co.* [1894] A. C. 8, 11; *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169; *Holzapfel's C. Co. v. Rahtjen's Am. C. Co.* 183 U. S. 1; *Candee v. Deere,* 54 Ill. 439; 19 Pat., D. & T. Cas. 418. The word "Carbolineum" could not be a lawful trade-mark because it is generic. *In re Graham,* Dec. of Comm'r of Pat. (1872) 252; *Pratt Mfg. Co. v. Berry,* 136 U. S. 647; *Bourne v. Swan,* 20 Pat., D. & T. Cas. 105; 19 Pat., D. & T. Cas. 422. The word "Carbolineum" could not be lawfully used as a trade-mark because it was the name of a patented article and its use as a trade-mark would give a monopoly on the article after the expiration of the patent. *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169; *Ex parte Velvril Co.* 84 O. G. 807; *Tucker Mfg. Co. v. Boyington,* Dec. of Comm'r of Pat. (1876) 313; *Wilcox & G. S. M. Co. v. The Gibbens Frame,* 17 Fed. 623; *Ex parte Hall,* 98 O. G. 2174; *Chalmers K. Co. v. Columbia M. K. Co.* 160 Fed. 1013; *British V. C. Co. v. New V. C. Co.* [1907] 2 Ch. D. 312, 323, 324; 100 O. G. 450; 18 Pat., D. & T. Cas. 191. The court erred in finding that plaintiff did not abandon his claim or rights to the word "Carbolineum" alone as his trade-mark. *Pickard v. Sears,* 6 Ad. & E. 469; Bigelow, Estoppel, 560, 620; *State v. Wertzel,* 62 Wis. 184; *DeBussche v. Alt,* L. R. 8 Ch. D. 286; 1 Cyc. 630; Hopkins, Trade-marks, 46, 183, 320, 321, 325, 450, 454; *Gem C. Co. v. Leach,* 114 O. G. 2089; *Pittsburgh C. S. Co. v. Diamond S. Co.* 85 Fed.

637; subd. 3, sec. 2656, Stats. (1898); *U. S. v. Beebee,* 17 Fed. 36; *Likens v. Likens,* 136 Wis. 321, 117 N. W. 799; *Mexican Nat. R. Co. v. Jackson,* 89 Tex. 107; Hesseltine, Trade-marks, 108, 284–287. The court erred in refusing to find that the government of Austria-Hungary canceled the word "Carbolineum" as a trade-mark because it was descriptive and in common use as the name of a commodity. Treaty with Austria-Hungary and Germany, 2 O. G. 418; Austro-Hungarian Trade-mark Law, 52 O. G. 1539; 59 O. G. 1611; German Registration of Trade-marks, 31 O. G. 1447; 71 O. G. 145; Hopkins, Trade-marks, 446, 459, Trade-mark Law of U. S. (1881), sec. 5; Id. 722, Wisconsin Trade-mark Laws; 22 Cyc. 1744; *Ex parte Circle Mfg. Co.* 98 O. G. 2365; *Columbia W. P. Co. v. Columbia E. S. R. L. & P. Co.* 172 U. S. 475; *Bonacum v. Murphy,* 71 Neb. 463, 98 N. W. 1030, 1037; *Disconto Gesellschaft v. Umbreit,* 127 Wis. 651; Devlin, Treaties, secs. 2, 168, 214–219; *In re Chesebrough's Trade-mark,* [1902] 2 Ch. D. 1, 9–14. The court erred in failing to find as a conclusion of law that, as Presser had registered a trade-mark in Germany, he had the right to sell his product under that mark to the world. *Schoerken v. Swift & C. & B. Co.* 7 Fed. 469; *Apollinaris Co. v. Scherer,* 23 Blatch. 459; *Dover S. Co. v. Fellows,* 163 Mass. 191; *Seigert v. Abbott,* 25 N. Y. Supp. 590; *Ex parte Bishop,* 107 O. G. 1973; *Shallenberger v. Pennsylvania,* 171 U. S. 1; *Plumley v. Massachusetts,* 155 U. S. 461; *Disconto Gesellschaft v. Umbreit,* 208 U. S. 570; *McMillan v. Spider Lake S. M. & L. Co.* 115 Wis. 332.

For the respondent there was a brief by *Otto Dorner,* attorney, and *Theodore Kronshage,* of counsel, and oral argument by *Mr. Dorner.* They contended, *inter alia,* that the word "Carbolineum" was not descriptive. Paul, Trade-marks, § 49; *Burnett v. Phalon,* 9 Bosw. 192; *Keasbey v. Brooklyn C. Works,* 142 N. Y. 467, 37 N. E. 476; *Pa. S. Mfg. Co. v. Myers,* 79 Fed. 87, 89; *Electro-Silicon Co. v.*

Hazard, 29 Hun, 369; *Electro-Silicon Co. v. Trask,* 59 How. Pr. 189; *Electro-Silicon Co. v. Levy,* 59 How. Pr. 469; *Leonard v. White's G. L. Co.* 38 Fed. 922. The distinction should be made between words which are the legitimate accepted terms in describing the qualities, ingredients, or characteristics of an article, and words which are but inferentially or remotely descriptive. In the one case the words will be understood by the public as indicating some peculiarity of the article itself, and not as pointing out origin or ownership; in the other they will be regarded rather in the light of words fancifully and arbitrarily used, and consequently serve the purpose of a trade-mark. *Ex parte Heyman,* 18 O. G. 922; *N. K. Fairbank Co. v. Central L. Co.* 64 Fed. 133; *In re "Bovril" Trade-mark,* 65 L. J. Ch. 715, [1896] 2 Ch. 600; *M. J. Breitenbach Co. v. Spangenberg,* 131 Fed. 160; *Sterling R. Co. v. Gorey,* 110 Fed. 372; *Wells & R. Co. v. Siegel, C. & Co.* 106 Fed. 77; *In re Francis,* Cox, Man. of Trade-mark Cases, No. 375; Dec. U. S. Pat. Comm'r (1871), 283; *Globe-Wernicke Co. v. Brown,* 121 Fed. 185; *Noel v. Ellis,* 89 Fed. 978; *Selchow v. Baker,* 64 How. Pr. 212; *Potter D. & C. Corp. v. Miller,* 75 Fed. 656; *Glen Cove Mfg. Co. v. Ludeling,* 22 Fed. 823; *Radam v. Shaw,* 28 Ont. 612; *Waterman v. Shipman,* 130 N. Y. 301; *Price B. P. Co. v. Fyfe,* 45 Fed. 799; *Northwestern Con. M. Co. v. Mauser,* 162 Fed. 1004; *Royal B. P. Co. v. Raymond,* 70 Fed. 376, 85 Fed. 231; *Royal B. P. Co. v. Sherrill,* 59 How. Pr. 17; *Royal B. P. Co. v. Royal,* 122 Fed. 337; *Insurance O. T. Co. v. Scott,* 33 La. Ann. 946; *In re Glines,* 8 O. G. 435; *Listman M. Co. v. Wm. Listman M. Co.* 88 Wis. 334; *Am. G. Co. v. Sloan,* 68 Fed. 539; *Tetlow v. Tappan,* 85 Fed. 774; *Bailly v. Nashawannuk Mfg. Co.* 10 N. Y. Supp. 224; *Stoughton v. Woodard,* 39 Fed. 902; *Hiram Holt Mfg. Co. v. Wadsworth,* 41 Fed. 34; *O'Rourke v. Central City S. Co.* 26 Fed. 576; *Schendel v. Silver,* 18 N. Y. Supp. 1; *Colgate v. Adams,* 88 Fed. 899, 900; *Centaur Co.*

v. Killenberger, 87 Fed. 725; *Centaur Co. v. Robinson,* 91 Fed. 889; *Centaur Co. v. Neathery,* 91 Fed. 891; *Centaur Co. v. Hughes Bros. Mfg. Co.* 91 Fed. 901; *Centaur Co. v. Link,* 62 N. J. Eq. 147, 49 Atl. 828; *Battle v. Finlay,* 45 Fed. 796; *Arthur v. Howard,* 19 Pa. Co. Ct. Rep. 81; *Sterling R. Co. v. Eureka C. & Mfg. Co.* 70 Fed. 704, 80 Fed. 105; *Rawlinson v. Brainard & A. Co.* 59 N. Y. Supp. 880, 28 Misc. 287; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 32 Fed. 94; *Celluloid Mfg. Co. v. Read,* 47 Fed. 712; *Reddaway v. Banham,* 25 Eng. Rul. Cas. 193; *Nat. B. Co. v. Baker,* 95 Fed. 135; *Williams v. Mitchell,* 106 Fed. 168; *Ludington N. Co. v. Leonard,* 119 Fed. 937; *Social R. Asso. v. Howard,* 60 Fed. 270; *Lockwood v. Bostwick,* 2 Daly, 521; *Stern v. Barrett C. Co.* 61 N. Y. Supp. 221; *Smith v. Sixbury,* 25 Hun, 232; *Atlantic M. Co. v. Robinson,* 20 Fed. 217; *Am. F. C. Co. v. De Lee,* 67 Fed. 329; *Cohn v. Reynolds,* 57 N. Y. Supp. 469; *Volger v. Force,* 71 N. Y. Supp. 209; *Little v. Kellam,* 100 Fed. 353; *N. K. Fairbank Co. v. Luckel K. & C. S. Co.* 102 Fed. 327; *McLoughlin v. Singer,* 53 N. Y. Supp. 342; *Petrolia Mfg. Co. v. Bell & B. S. Co.* 97 Fed. 781; *Weinstock v. Marks,* 109 Cal. 529; *Crawford v. Lans,* 60 N. Y. Supp. 387; *Roberts v. Sheldon,* 8 Biss. 398; *Fulton v. Sellers,* 4 Brewst. 42; *Rillet v. Carlier,* 11 Abb. Pr. N. S. 186; *Kerry v. Toupin,* 60 Fed. 272; *Huwer v. Dannenhoffer,* 82 N. Y. 499; *New Home S. M. Co. v. Bloomingdale,* 59 Fed. 284; *George v. Smith,* 52 Fed. 830. One is entitled to have several forms of his trade-mark or several trade-marks upon the same goods. The addition or absence of his name does not change the mark. A trader may have one mark for the European market and another mark for the United States. *Morrison v. Case,* 9 Blatchf. 548; 2 O. G. 544; Cox, Man. of Trade-mark Cases, Nos. 226, 394, 501, 675; *In re Weaver,* 10 O. G. 1; *Hier v. Abrahams,* 82 N. Y. 519, 524; *Braham v. Bustard,* 1 H. & M. 447; 9 L. J. N. S. 199, 2 New Rep. 572; *Ford v. Foster,* L. R.

7 Ch. 611, 616, 27 L. T. N. S. 219, 41 L. J. Ch. 682; *Harrison v. Taylor,* 11 Jur. N. S. 408; *Johnson v. Bauer,* 82 Fed. 662, 27 C. C. A. 374. If there are several parts to one trade-mark the owner will be protected though only one of the parts be imitated, if the imitation is such as to deceive purchasers. *Saxlehner v. Eisner,* 179 U. S. 19, 33; *Hostetter v. Vowinkle,* 1 Dill. 329; *Am. G. P. Asso. v. Grocer P. Co.* 25 Hun, 398; *Shaver v. Shaver,* 54 Iowa, 208; *Cahn v. Gottschalk,* 2 N. Y. Supp. 13; *Ford v. Foster,* L. R. 7 Ch. 611. The fact that a word has been extensively or generally used as the popular name of the article will not dedicate it to the public or deprive the owner of his exclusive rights. Paul, Trade-marks, §§ 39, 114; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 32 Fed. 94; *Celluloid Mfg. Co. v. Read,* 47 Fed. 712; *Selchow v. Baker,* 93 N. Y. 59; *Burton v. Stratton,* 12 Fed. 696; *Schendel v. Silver,* 63 Hun, 330. Plaintiff by registering the words "Carbolineum Avenarius" in the United States did not abandon the use of the word "Carbolineum" as his trade-mark, and the date stated in his application for registration is conclusively the date at which he first used his mark. *Saxlehner v. Eisner,* 179 U. S. 19, 32, 88 Fed. 61; *Kohler Mfg. Co. v. Beeshore,* 59 Fed. 572, 8 C. C. A. 215; *Ex parte Listman M. Co.* 119 O. G. 340; *Gem C. Co. v. Leach,* 114 O. G. 2089; *Canepa v. Boehm,* 117 O. G. 2089; *Hyman v. Solis C. Co.* 4 Colo. App. 475, 36 Pac. 444; *Ex parte Standard U. C. Co.* 119 O. G. 1925; *Ex parte Carborundum Co.* 118 O. G. 2250; 26 Am. & Eng. Ency. of Law (2d ed.) 367; *Leschen v. Broderick,* 123 Fed. 149. A copy of a foreign judgment should be authenticated by the custodian of the original. His character as custodian and his signature should be authenticated by the judge of the court whose records he has in custody, under the seal of the court. This seal and signature should be certified under the great seal of state by the custodian of the great seal. 2 Black, Judgments, § 847; *Church v. Hubbart,* 2 Cranch,

187, 2 L. Ed. 249; *Lazier v. Westcott,* 26 N. Y. 146, 82 Am. Dec. 404; *Vandervoort v. Smith,* 2 Caines, 155; *Thompson v. Mason,* 4 Ill. App. 452; 1 Greenl. Ev. § 514; *Gunn v. Peakes,* 36 Minn. 177; *Spaulding v. Vincent,* 24 Vt. 501. The United States courts, while they take judicial notice of foreign nations and their great seals of state, do not notice inferior departments and courts nor the officers and seals thereof. *Shoerken v. Swift,* 19 Blatchf. 209; *Beach v. Workman,* 20 N. H. 379; *Griswold v. Pitcairn,* 2 Conn. 85; *De Sobry v. Laistre,* 2 H. & J. 191, 3 Am. Dec. 535; *Comm. v. Snowden,* 1 Brewst. 218; *Delafield v. Hand,* 3 Johns. 310; *Berkery v. Reilly,* 82 Mich. 160.

KERWIN, J. The findings of the trial court above set out give a sufficient statement of the material facts in the case. Findings 8, 10, 13, 15, 18, and 19 are attacked for want of evidence to support them. We think the findings challenged are well supported by the evidence and shall spend no time upon that point. It is also claimed that the ninth finding is inconsistent, since it finds that the word "Carbolineum" was intended as a trade-mark and also a specific name and designation for a commodity, and that the word cannot serve the double purpose of a trade-name and also the name of the compound. It is not easy to reconcile the authorities upon the point, some cases holding that, when a new compound is discovered and christened and given a name, the name cannot also be appropriated as a trade-mark, but the cases appear to turn on whether the word denotes origin or ownership or is merely descriptive. The exclusive right to use words, letters, or symbols to indicate merely the quality of goods to which they are affixed cannot be acquired. But the rule seems to be otherwise if the primary object of the trade-mark be to indicate origin or ownership. *Canal Co. v. Clark,* 80 U. S. 311; *Lawrence Mfg. Co. v. Tenn. Mfg. Co.* 138 U. S. 537, 11 Sup. Ct. 396; *W. R. Lynn S. Co. v. Auburn-Lynn S. Co.* 100 Me. 461, 62 Atl. 499; *Marshall v. Pinkham,* 52

Wis. 572, 9 N. W. 615. So the doctrine that a name cannot be a trade-mark or trade-name only applies when the name is used to describe the kind or quality of the thing sold and not the article of a particular maker or seller. This doctrine seems to be recognized in the cases cited by appellant. In *Canal Co. v. Clark, supra,* it was held that where one mined coal in the Lackawanna Valley, Pennsylvania, and his coal has become known as "Lackawanna coal," others who come in afterwards and mine coal in another part of the valley cannot be enjoined from calling their coal "Lackawanna coal," it being in fact and in its generic character properly so designated; and that because the complainants had not coined the word "Lackawanna," but found it a settled and known appellation of the district in which their coal deposits and those of others were situated, and not applying to any manufacture of theirs, but to that portion of the coal of the valley in which they mined and marketed it, and differing neither in nature or quality from all other coal of the same region, the word could not be appropriated. The court said, page 323:

"Hence the trade-mark must either by itself or by association point distinctively to the origin or ownership of the article to which it is applied. The reason of this is that, unless it does, neither can he who first adopted it be injured by any appropriation or imitation of it by others nor can the public be deceived. The first appropriation of a name or device pointing to his ownership, or which, by being associated with articles of trade, has acquired an understood reference to the originator or manufacturer of the articles, is injured whenever another adopts the same name or device for similar articles, because such adoption is in effect representing falsely that the productions of the latter are those of the former."

In *Manufacturing Co. v. Trainer,* 101 U. S. 51, 53, the court said:

"The general doctrines of the law as to trade-marks, the symbols or signs which may be used to designate products of a particular manufacture, and the protection which the courts

will afford to those who originally appropriated them, are not controverted. Every one is at liberty to affix to a product of his own manufacture any symbol or device, not previously appropriated, which will distinguish it from articles of the same general nature manufactured or sold by others, and thus secure to himself the benefits of increased sale by reason of any peculiar excellence he may have given to it."

In *Candee, S. & Co. v. Deere & Co.* 54 Ill. 439, the question was whether one manufacturer of plows at Moline, Illinois, could appropriate as his own, to the exclusion of all other manufacturers at the same place, the name of the place, and thus prevent other manufacturers from designating their manufacture as of the place where they are actually made; and it is said the cases do not go to that extent. It is further said in the opinion that the words "Moline, Ill.," had acquired a generic meaning, and one manufacturer at Moline had the same right to use them that any other manufacturer there had.

In *Royal B. P. Co. v. Sherrell,* 93 N. Y. 331, it was held that the word "Royal," as indicating quality or grade, could not be appropriated as a trade-mark, and it was said:

"The right to use a word or name as a trade-mark is the right which a person has to use a certain mark or name for articles which he has manufactured so that he may prevent another person from using it, because the mark or name denotes that articles so marked or named were manufactured by a certain person, and no one can have the right to put the same name or mark upon his goods and thus represent them to have been manufactured by the person whose mark it is. Per Sir V. PAGE-WOOD, V. C., in *Collins Co. v. Cowen,* 3 K. & J. 428. But there can be no exclusive right to the use of words or marks which have no relation to the origin or ownership of the goods and are only meant to indicate their quality or grade."

In *Beadleston & Woerz v. Cooke B. Co.* 74 Fed. 229, the majority of the court held that the word "Imperial" was a designation of quality in the connection used and therefore

could not be appropriated as a trade-name, although the court observes that the word is close to the border line between terms that signify quality and those that do not. There is a strong dissent from the proposition that the word is descriptive or designates quality.

In *Chaffee Mfg. Co. v. Selchow,* 131 Fed. 543, it was held that the word "Flinch" was generic and known to the public and therefore was not the subject of a trade-mark, citing Browne, Trade-marks, §§ 87–91; Paul, Trade-marks, § 35. The court said, pages 545, 546:

"If chess or golf or whist were now invented and named, could any manufacturer or vendor of the implements with which such games are played obtain a trade-mark in their names by selling such implements put up in boxes marked with the names of the games? He of course could adopt a trade-mark to distinguish the chessmen or the playing cards or the golf clubs which he made from those made by others, but I think he could not acquire a trade-mark in the names of the games by simply selling the games after they had become known to the public under such names."

In *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169, 16 Sup. Ct. 1002, the question arose upon the expiration of a patent during the existence of which the word "Singer" as used to indicate style of the machine rather than as solely indicating the origin of manufacture had become public and constituted the generic description. It was held that at the expiration of the patent the right to make the patented article and to use the generic name passed to the public with the dedication resulting from the expiration of the patent.

In *Holzapfel's C. Co. v. Rahtjen's A. C. Co.* 183 U. S. 1, 22 Sup. Ct. 6, the right to manufacture the compound had become public, and it was held that the name by which it was known likewise became public. It is said in the opinion that there was no attempt to pawn off the composition of one for the composition of another, and no pretense of deception as to the person who in fact manufactured, and that the prin-

ciples involved in *Singer Mfg. Co. v. June Mfg. Co., supra,* apply.

Under the claim of appellant that a generic name or a name merely descriptive of an article of trade or its qualities or characteristics cannot be employed as a trade-mark and entitled to protection, a long list of authorities is cited as to what words have been held descriptive in the sense that they cannot be appropriated as trade-marks. We shall not attempt to review the numerous cases cited by appellant upon this point. We believe it would be difficult, if not impossible, to reconcile all the authorities upon the subject. The general rule has often been stated, but the difficulty arises in applying it to the particular case. This court has stated the general rule as follows:

"It has often been decided that words which are merely descriptive of the kind, nature, style, character, or quality of the goods or articles sold cannot be exclusively appropriated and protected as a trade-mark. . . . It seems to be the office of a trade-mark to point out the true source, origin, or ownership of the goods to which the mark is applied, or to point out and designate a dealer's place of business, distinguishing it from the business locality of other dealers." *Marshall v. Pinkham,* 52 Wis. 572, 578, 580, 9 N. W. 617, 618.

And in *Dunbar v. Glenn,* 42 Wis. 118, 137:

"Where the trade-mark in its original signification or by association distinctively points to the origin or ownership of the article to which it is applied, it will be protected. But where it is a generic or geographical name, designating a city or district or country, or is merely descriptive of the article manufactured, and can be employed with truth by other manufacturers, it is not entitled to legal protection as a trade-mark."

That the word "Carbolineum" as applied to the facts in this case could be appropriated as a trade-mark we think is well supported by authority. The name was applied by the plaintiff in 1876 to a compound of his own invention,

namely, a wood-preserving paint and liquids composed of a high distillate of coal tar, which he called "Carbolineum." During all the time since 1876 he has continuously called his product by the name of "Carbolineum," and affixed such name either alone or in connection with other indicia to the receptacles containing the same and sold the product under said name in European countries, and that the word "Carbolineum" was coined and originated by the plaintiff and was wholly unknown when first used by him, and has always been used by him as his trade-mark to designate his invention. Such arbitrary word newly coined and adopted by plaintiff to distinguish his production from that of others, and not merely descriptive of the article manufactured, is a valid trade-mark. *Dunbar v. Glenn,* 42 Wis. 118; *Marshall v. Pinkham,* 52 Wis. 572, 9 N. W. 615; *Fish Bros. W. Co. v. La Belle W. Works,* 82 Wis. 546, 52 N. W. 595; *Listman M. Co. v. Wm. Listman M. Co.* 88 Wis. 334, 60 N. W. 261; *W. R. Lynn S. Co. v. Auburn-Lynn S. Co.* 100 Me. 461, 62 Atl. 499; Paul, Trade-marks, § 49; *Burnett v. Phalon,* 9 Bosw. 192; *Keasbey v. Brooklyn C. Works,* 142 N. Y. 467, 37 N. E. 476; *Pennsylvania S. Mfg. Co. v. Myers,* 79 Fed. 87; *N. K. Fairbank Co. v. Central L. Co.* 64 Fed. 133; *Leonard v. White's G. L. Co.* 38 Fed. 922; *Potter D. & C. Corp. v. Miller,* 75 Fed. 656; *Northwestern C. M. Co. v. Mauser & C.* 162 Fed. 1004; *Nat. B. Co. v. Baker,* 95 Fed. 135.

An examination of the foregoing cases and many others which might be cited will clearly show that the word "Carbolineum" is not so descriptive of the quality of plaintiff's compound as to make it obnoxious to the rule forbidding the use of descriptive words as trade-marks or trade-names. Newly coined words have been generally sustained as proper trade-marks, because such words, being meaningless, cannot be either descriptive or deceptive. In *W. R. Lynn S. Co. v. Auburn-Lynn S. Co.* 100 Me. 461, 62 Atl. 499, 960, the

plaintiff was held entitled to the exclusive use of the name "Auburn-Lynn Shoes." In *Le Page Co. v. Russia C. Co.* 51 Fed. 941, it is said:

"It is equitable that a manufacturer who has given reputation to any article should have the privilege of realizing the fruits of his labors by transmitting his business and establishment with the reputation which has attached to them on his decease to his legatees or executors, or during his lifetime to purchasers; and it is also in accordance with the principles of law and justice to the community that any trade-mark, including a surname, may be sold with the business or the establishment to which it is incident, because, while it may be that individual efforts give them their value at the outset, yet afterwards this is ordinarily made permanent as a part of the entire organization or as appurtenant to the locality in which the business is established, and thenceforward depends less on the individual efforts of the originator than on the combined result of all which he created."

The point that, when the plaintiff gave his product a name and it was a new product and known by no other name, the name became *publici juris,* is not sustained by the great weight of authority. Some cases, it is true, support this idea. But where a product is manufactured and the compound is a secret invention, as in this case, the inventor may coin a new name for his product by which it is to be known, and he is entitled to protection of such name as his trade-mark or trade-name. The plaintiff's compound of anthracine oil is one of the products included in the general designation. It is the plaintiff's product—his own secret compound. Anthracine oil is the general name for the product, but the plaintiff's manufacture of this general product invented by himself by a secret process is his manufacture, and his trade-name is entitled to protection. The purpose of the trade-mark is to give the plaintiff's special invention a distinctive name for his anthracine oil to distinguish his manufacture and point to its origin. The court found that the plaintiff constructed the word to make his goods known by the name

"Carbolineum" and used the word as a trade-mark. Reference to a few of the many cases upholding words as proper trade-marks will suffice: "Uneeda" as applied to a biscuit (*Nat. B. Co. v. Baker,* 95 Fed. 135); "Cuticura" as a trade-mark for toilet soap (*Potter D. & C. Corp. v. Miller,* 75 Fed. 656); "Valvoline" for lubricating oil (*Leonard v. White's G. L. Co.* 38 Fed. 922); "Cottolene" designating a substitute for lard composed of cotton-seed oil (*N. K. Fairbank Co. v. Central L. Co.* 64 Fed. 133); "Saponifier" used in soap making (*Pennsylvania S. Mfg. Co. v. Myers,* 79 Fed. 87); "Bromo-Caffeine" as name of a chemical compound (*Keasbey v. Brooklyn C. Works,* 142 N. Y. 467, 37 N. E. 476); "Auburn-Lynn" shoes (*W. R. Lynn S. Co. v. Auburn-Lynn S. Co.* 100 Me. 461, 62 Atl. 499). This court said in *Listman M. Co. v. Wm. Listman M. Co.* 88 Wis. 334, 340, 60 N. W. 262:

"But a valid trade-mark may consist of some novel device, arbitrary character, or fancy word applied without special meaning, which by use and reputation comes to serve the same purpose. Such words and devices are held to indicate sufficiently the true source and origin of the goods without particular addition of the name of the manufacturer or dealer."

In *Dunbar v. Glenn,* 42 Wis. 118, the owner of the water of a mineral spring applied the name of "Bethesda" to the spring and used the mark "Bethesda" on barrels in which the water was shipped and recorded the word, and it was held that the name was a valid trade-mark and that the defendant, who owned another spring 1,200 feet from that of plaintiff, which was alleged to have exactly the same chemical constitution and curative properties, was not entitled to the use of plaintiff's trade-mark.

Actions to restrain the infringement of trade-marks are based upon the doctrine that the law will not allow one person to sell his own goods as and for the goods of another; and this is to prevent not alone fraud upon private rights, but as

well upon the public. *Marshall v. Pinkham,* 52 Wis. 572, 580, 9 N. W. 615; *Dunbar v. Glenn, supra.*

It may well be, as contended by appellant, that, when one owning a newly patented product gives it a name, such name becomes *publici juris* on the expiration of the patent; but the point has no bearing here. The patent which it is claimed covered the product was not put in evidence. There is no evidence that it covered the plaintiff's product, but only a part of the process of manufacture. It may have been on a mere detail. But more than this, the evidence as to the patent shows that, whatever it was, it was not granted until about twelve years after plaintiff coined and adopted the word "Carbolineum" for his product. The trade-mark antedated by about twelve years the patent, whatever the patent was, and the expiration of the patent in no way affected the trade-mark. *Batcheller v. Thomson,* 93 Fed. 660, 35 C. C. A. 532.

It is also argued that plaintiff abandoned the right to use the word "Carbolineum" as his trade-name. On this point, also, the evidence and findings are against appellant. It is unnecessary to discuss the evidence. It fully supports the finding. Plaintiff constantly used the word as his trade-name and applied for registration of it in various foreign countries and was diligent in his efforts to protect it as his trade-name. The use of his name in connection with "Carbolineum" did not amount to an abandonment. Plaintiff is not confined to one form of his mark nor even to several marks. *Morrison v. Case,* 9 Blatchf. 548, Fed. Cas. No. 9,845; *Hier v. Abrahams,* 82 N. Y. 519; *Ford v. Foster,* L. R. 7 Ch. 611, 616; *Johnson v. Bauer,* 82 Fed. 662. In *Dunbar v. Glenn,* 42 Wis. 118, 135, this court said:

"It seems to be well settled that the owner of any original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms, or symbols that he may appropriate as designating the true origin or ownership of the article or fabric to which they are affixed."

In *Saxlehner v. Eisner & M. Co.* 179 U. S. 19, 21 Sup. Ct. 7, the court said (p. 33):

"It is not necessary to constitute an infringement that every word of a trade-mark should be appropriated. It is sufficient that enough be taken to deceive the public in the purchase of a protected article."

The fact that plaintiff registered the words "Carbolineum Avenarius" in this country was no abandonment of the word "Carbolineum" as his trade-mark, at least unless it was shown that he intended such abandonment, and the court below found otherwise. The registration does not create nor destroy rights in a trade-mark. The right to use a device to distinguish the goods made or sold by a person whose mark it is, has long been recognized by the common-law and chancery courts of England and this country. "This exclusive right was not created by the act of Congress, and does not depend upon it for its enforcement. The whole system of trade-mark property and the civil remedies for its protection existed long anterior to that act, and have remained in full force since its passage." The right depends upon priority of appropriation. *Trade-mark Cases,* 100 U. S. 82; *Ex parte Carborundum Co.* 118 Off. Gaz. 2250; *A. Leschen & Sons R. Co. v. Broderick & B. R. Co.* 123 Fed. 149.

Error is assigned because the trial court refused to find that Austria had canceled the plaintiff's trade-name "Carbolineum," and also because the court refused to find that Presser had registered a trade-mark in Germany which included the word "Carbolineum." It is at least very doubtful whether the evidence offered was competent to prove the facts sought to be established under this head. But, even if so, the evidence offered was immaterial. The plaintiff advertised and sold his goods in Europe from the time he adopted his trade-name in 1876 until 1886 and endeavored in every way to protect it as his trade-name. Whether he could have registered it in foreign countries under their laws as a trade-

name is not material. Our courts are not bound by any foreign rule, judicial or otherwise, as to the precise essentials of a trade-mark. The question is whether plaintiff's claim is in harmony with the law, written and unwritten, of this country. Nor do our courts decide what trade-marks exist or do not exist in foreign countries. The question is whether the plaintiff was entitled to have his trade-name recorded here. *Vacuum O. Co. v. Eagle O. Co.* 122 Fed. 105; *Hohner v. Gratz,* 50 Fed. 369; *The Apollon,* 9 Wheat. 362; *De Brimont v. Penniman,* 10 Blatchf. 436, Fed. Cas. No. 3,715; Browne, Trade-marks, §§ 50, 51.

The court below found that there was a material difference between the two products and this finding is clearly supported by the evidence. Nor is there any doubt under the proof made of the intention of the defendant to deceive and appropriate the trade-name of the plaintiff for his own benefit and to the damage of the plaintiff. It is unnecessary to go into a discussion of the evidence under this head.

Nor has any laches been shown upon the part of the plaintiff. On the contrary, from first to last plaintiff appears to have been diligent in endeavoring to protect his use of the trade-name "Carbolineum." He could not protect it further than he did in foreign countries under their laws. In October, 1886, he applied for registration, and in February, 1887, his trade-name was registered in the United States, and at the time plaintiff first used the word "Carbolineum" it had not been used by any other person for any purpose and was wholly unknown. It follows that the judgment of the court below must be affirmed.

By the Court.—The judgment is affirmed

TIMLIN, J. (*dissenting*). The pivotal facts in this case are established beyond controversy, although not all included in the findings of fact of the trial court.

1. The plaintiff is a citizen and resident of the municipal-

ity of Gau-Algesheim in the grand duchy of Hesse in the German Empire, where he is now and has been since 1876 engaged in the manufacture and sale of a wood-preserving compound produced by distillation from coal tar. This compound he discovered in 1876. It was unknown prior to that time. To this new compound he gave at the time of its discovery the name of "Carbolineum," a word not theretofore in use and coined or devised by him from the Latin words "carbo," signifying coal, and "oleum," meaning oil. The amended complaint avers that "plaintiff coined, invented, originated, and adopted the arbitrary fanciful word symbol 'Carbolineum' as *a name* and a trade-mark for his said paint and liquid." The plaintiff testifies:

"I constructed this word out of my own fancy in analogy to the Latin words 'carbo,' coal, and 'oleum,' oil, and in doing so it was my purpose *to make my goods known by this word,* which up to that time had not been in existence, *and* to use the word as a trade-mark. I called my goods by the name 'Carbolineum,' offered them for sale under that name in letters, circulars, and advertisements and invoiced them as such, and marked the packages, so far as possible, with this name. Under the early German trade-mark law the protection of word trade-marks was not feasible, and legal protection could not be obtained there for the word 'Carbolineum' I had created. Legal proceedings against its misuse were useless."

The ninth finding of the circuit court was as follows:

"That during all said time of plaintiff's said use of said word, both in said European countries and in the United States, said plaintiff has claimed and intended said word as his trade-mark, and *as a specific name and designation for his said product,* to indicate that the article to which the same was so applied and affixed was the manufacture of said plaintiff, and that said plaintiff has relied upon said name and designation to distinguish his said product with the public and to indicate its origin, and that his said product is so distinguished with the trade by said name and designation, as thus indicating its origin."

From the foregoing it must be assumed as a verity in this case that the plaintiff, upon the discovery of an article or compound never theretofore known, gave it a name devised by him and never theretofore known or used, and that in so doing he had the double purpose of designating this new discovery by this new name and also claiming this name by which the new discovery was solely known as a trade-mark. I think the law, properly understood and applied, does not permit of the adoption of such name as a trade-mark nor the use of any word, however arbitrary and fanciful, for this double purpose. The reason for this rule lies in the legal nature of a trade-mark. An essential of a trade-mark is that it is employed to distinguish the goods of its owner from like goods of another. A postulate of the law of trade-marks is that there are or may be others manufacturing, selling, and dealing in goods of the same kind as those protected by the trade-mark which might but for the trade-mark be mistaken by the purchaser for the goods of the owner of the trade-mark. To permit the discoverer of a new article or compound to coin any name by which that article or compound shall be known and at the same time adopt that name as a trade-mark would be to foster a monopoly and defeat the most fundamental idea of trade-mark law. When an article is made that was theretofore unknown it must be given a new name by which it can be recognized and dealt in, and the name thus given to it becomes public property, and all who deal in the article have the right to designate it by the name by which alone it is recognized. *Leclanche B. Co. v. Western E. Co.* 23 Fed. 276; *Leonard & Ellis v. Wells & Co.* 53 L. J. Ch. 233. When the judgment in the case last cited came before the court of appeals (53 L. J. Ch. 603), the opinion of the Lord Chancellor went largely on the ground that the word "Valvoline" had been used as a descriptive term to designate a certain kind of oil and that the claimants of the trade-mark used it for this double purpose, and therefore others might use the word

"Valvoline" as descriptive of the thing which they made and in such a way as not to represent that it was the product, manufacture, or property of the claimants. COLTON, L. J., said:

"Undoubtedly, in my opinion, when a man invents a new article, and invents a word as descriptive of that article, which all the world are at liberty to make, he stands in a very great difficulty as regards claiming for himself the exclusive use of that name which he has invented to describe the article which he himself has invented."

FRY, L. J., said:

"Now, when a new material is invented, and at the time a new single word is invented which is applied to that material alone, I am by no means satisfied at present that that single word can be treated as a special and distinctive word within the meaning of the section I have read. It is difficult to suppose that one word can both describe the thing as made by anybody and the thing as made by a particular maker."

See, also, *Linoleum Mfg. Co. v. Nairn,* 38 L. T. Rep. N. S. 448, 47 L. J. Ch. 430; also *Holzapfel's C. Co. v. Rahtjen's A. C. Co.* 183 U. S. 1, 22 Sup. Ct. 6.

As I understand the case last cited, there is properly deducible therefrom the fourth proposition of the syllabus, viz.:

"When the right to manufacture became public, the right to use the only word descriptive of the article manufactured became public also."

This rule is not limited to the case of patented articles upon which the patent has expired. Such cases are merely illustrative of the rule—a narrow application of the more general rule that the right to use the only word descriptive of the article manufactured is the right of the public. It cannot make any difference how this word became the only word descriptive of the article. *Oglivie v. G. & C. Merriam Co.* 149 Fed. 858 (expiration of copyright); *Warren F. Co. v. Am. F. Co.* 141 Fed. 513 (expiration of some patents); *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169, 16 Sup. Ct. 1002

(expiration of all patents); *In re Magnolia M. Co.'s Trade-marks,* 14 Rep. Pat. Cas. 621 (discovery of secret process); Kerly, Trade-marks, 243. It is not because there were letters patent, which letters have expired, that the public may make and sell the article by its patented designation, but because the designation of the patented article has become descriptive and has become the name by which the article is known.

In *In re Chesebrough Mfg. Co.'s Trade-mark,* 19 Rep. Pat. Cas. (1902) 342, this question is suggested in the majority opinion at page 353, but it was not decided, because there was evidence that the word "Vaseline" was used originally to denote the goods manufactured by the Chesebrough Company. In the opinion of Justice COZENS-HARDY it is said:

"I have reluctantly come to the conclusion that it appears from the appellant's own evidence that the word 'Vaseline' was an invented word to describe an invented thing, and, if so, I think it follows that any one was at liberty to make the invented article, which was not protected by patent in England, and at liberty to call it by the name attributed to it by the inventor. In the case of *Linoleum Mfg. Co. v. Nairn,* L. R. 7 Ch. D. 834, Mr. Justice FRY applied this principle to the case of a patented article after the expiration of the patent, but I think it cannot be limited to that case."

No one can claim protection for the exclusive use of a trade-mark or trade-name which would practically give him a monopoly. *Canal Co. v. Clark,* 13 Wall. 311, 323.

It may be said that the inventor of a new compound who at the same time invents a new name for such compound does not thereby prevent others from devising other new and fanciful names for the same compound, and this is true. This privilege on the part of others would be of little practical use to them, but that is quite immaterial. The real objection is that such use of a newly coined word as a trade-mark enables the owner at once to describe the new compound by that name without reference to who makes it or where it is made, and at the same time appropriate that word as a sign to the pub-

lic that the particular goods so marked are not of or belonging to the class or genera indicated by that name, but are distinguished therefrom as the superior product in that line of his own skill, industry, or honesty. These two uses of the invented word are to me inconsistent. If so, it follows that the exclusive use must yield. This is my first ground of dissent.

2. But the facts in this case additional to those above noted are that after plaintiff had been engaged for more than ten years in the manufacture and sale in Germany of "Carbolineum," and on February 8, 1887, he registered in the Patent Office of the United States as his trade-mark for preservative liquids the word "Carbolineum." Two years thereafter and on April 19, 1889, he registered in the same office as his trade-mark for preserving paint the words "Carbolineum Avenarius." Prior to such registry the word "Carbolineum" had become known in Germany and elsewhere in Europe as a name descriptive of this product of coal tar. George Presser, who lived in the same village with plaintiff, according to plaintiff's testimony began in 1882 to use the word "Carbolineum" as the name of a commodity which he, Presser, manufactured and sold and continues the same up to the present time. Exhibit A, a circular which the plaintiff issued to the German trade in 1885, complains that certain parties "continue to advertise with unbecoming praises preparations of demonstrably inferior value, under the same designation, using the name 'Carbolineum' chosen by us about ten years ago for our product." It further sets forth that "prominent in the class pointed out is the firm of Presser, a firm which goes so far in charlatanry as to advertise its product as being of 'worldwide fame,' and does not shrink from designating the 'Carbolineum Presser as the only right impregnated oil.'" Again:

"A 'Carbolineum Lendle' has lately also been offered for sale, which announces its advantages in like 'modest' manner, without the least restraint, and which might be regarded as

passable, if its manufacturers had copied the qualities of our antisepticum as well as the prospectuses concerning it. Lendle's imitation differs from Carbolineum Avenarius similarly to the surrogate of Presser. From all this it appears that our original product, which by way of distinction we now call 'Carbolineum Avenarius,' has not been approximately reached in any quarter. The name 'Carbolineum' is our intellectual property, the composite parts and the composition of our product are our secrets, and in view of its recognized qualities attested by numerous and unusually favorable testimonials, partly founded upon ten years' use, given by state and civil authorities, by railroad administrations, by construction engineers, manufacturers, in agricultural articles, etc., it is not to be wondered at that here and there are found imitators which—if we did not put up a front against them—would be able to bring the name of 'Carbolineum' into discredit within a short time. Our three factories are fully occupied with the manufacture of Carbolineum Avenarius, and the extent of our sales offers the best proof of the general approbation which our antisepticum is finding at home and abroad. For the benefit of those interested, who are not intimately acquainted with our product, we would add that Carbolineum Avenarius is an antiseptic, thin liquid used for coating and impregnating, instead of oil paint or tar," etc.

To my mind the foregoing proves to a demonstration that in 1885, prior to the registration in the United States Patent Office by the plaintiff of the word "Carbolineum:" (1) That the word was in common use in Germany to designate a preservative liquid. Only Presser and Lendle are named, but the circular also speaks of a class. These two with their clients or customers were enough. (2) Prior to the registry in the United States Patent Office the plaintiff had adopted as his trade-mark, not the word "Carbolineum," but the words "Carbolineum Avenarius," to designate his particular product of antiseptic, thin liquid used for coating and impregnating instead of oil paint or tar.

The plaintiff produced another circular issued by him in Germany in 1890, in which, among other things, he accused

Robert Krause of Wittenberg of making attacks upon Carbolineum Avenarius, and endeavoring to capture for his pseudo-carbolineum the preference. In this circular the plaintiff declares:

"To this paint invented by us whose composition is known to ourselves alone we gave the name of Carbolineum, a name which was not in existence before. We *wanted to indicate thereby that this paint was an oleaginous liquid* (*oleum*) *derived from coal* (*carbo*)."

To me this circular indicates in 1890 a disclaimer of any trade-mark consisting of the word "Carbolineum" and a claim that the plaintiff's trade-mark consists of the words "Carbolineum Avenarius," and a concession that the word "Carbolineum" was descriptive only. The defendant is shown to have been dealing in and selling Presser's Carbolineum manufactured by George Presser at the German municipality mentioned and exported therefrom to this country to the defendant to sell under the name of "Carbolineum Presser," and George Presser has a trade-mark officially registered in the proper department of the German Empire containing a center wheel with scrolls in an oval and the words "Schutzmarke für das Carbolineum. Georg Presser. Gau-Algesheim."

A witness for the plaintiff testified that he knew carbolineum from different factories in Switzerland in 1883, and there is in evidence a judgment of one of the imperial courts of Austria rejecting the word "Carbolineum" as a trade-mark because a word descriptive of a known compound, in an action in which this plaintiff herein was plaintiff and several other persons were defendants. Several books were introduced in evidence containing the word "Carbolineum" and definitions thereof, but none of them published earlier than 1900. It was admitted in the case that there is a large number of manufacturers in Germany manufacturing a product called "Carbolineum." It was shown that the plaintiff had procured in Germany in 1888 a patent on some part of

the process of making his wood preservative, but it is not shown what the patent covered, or whether still in force, nor what the designation employed therein to identify the liquid.

The judgment of the court below prohibits the defendant from advertising, offering for sale, or selling any preservative paint or liquid other than the product of the plaintiff by or under the name or designation of "Carbolineum." It seems to me that in rendering this judgment the court below treated the alleged trade-mark consisting of the word "Carbolineum" as still in force, notwithstanding the later registration of the trade-mark "Carbolineum Avenarius," and treated the German trade-mark of George Presser as having no force or effect, and ignored the evidence that prior to plaintiff's registration of the word "Carbolineum" as a trade-mark in the United States this word had become in Germany and elsewhere in Europe a common noun word descriptive of this compound, and throughout the case seems to consider a trade-mark somewhat analogous to a patent or copyright, and to depend upon priority of discovery of the compound or upon priority of invention of the name. Certainly the situation in which the case is left declares it to be the law of Wisconsin that Avenarius can exclude from Wisconsin all other German or European imports of this preservative substance under the name "Carbolineum" because, notwithstanding that Avenarius has no right to this trade-mark at the place of his residence and citizenship as against George Presser, he is given the right as against the consignee of Presser in Wisconsin by this decision. Supp. to Browne, Trade-marks (2d ed.) 161–164. But without going into this question of international regulations respecting trade-marks, I must upon the foregoing facts record my second ground of dissent; and that is that upon the uncontroverted evidence the word "Carbolineum" had become in Germany and elsewhere in Europe prior to the registration of that word as a trade-mark in the United States a common noun word descriptive of this certain liquid

wood preservative derived by distillation from coal tar, which any one was free to make and of course to call by its true name, and therefore the judgment enjoining the use of that word by defendant was wrong. *Selchow v. Chaffee & S. Mfg. Co.* 132 Fed. 996; *Dadirrian v. Yacubian,* 72 Fed. 1010; *S. C.* 98 Fed. 872; *S. C.* 90 Fed. 812. I think the judgment should be reversed for these errors.

DODGE, J. I concur in the foregoing dissenting opinion of Mr. Justice TIMLIN.

BARNES, J. I concur in the foregoing dissenting opinion of Mr. Justice TIMLIN.

WINSLOW, C. J. (*concurring*). In 1876 the plaintiff invented or discovered a compound, of which coal oil formed an important part, which was valuable as a preservative of wood, and also invented and applied to this article a new and arbitrary name, viz., "Carbolineum," under which name it was sold in Germany for ten years and acquired a reputation. Under the laws of Germany this arbitrary word could not become a trade-mark. In 1886 the plaintiff commenced to sell the article in this country and at once registered the word as his trade-mark. Should he be protected in its use? This is the question presented in this case, and it seems that it must be answered in the affirmative. It would be impossible to harmonize all of the trade-mark decisions nor need the attempt be made. The principle is very well established that he who invents and applies a new word or name to an article which he makes or sells, not descriptive of the article or its qualities, nor deceptive, but fanciful and arbitrary, though perhaps suggestive, will be protected in the use of the word or name as a trade-mark. Browne, Trade-marks (2d ed.) § 219. This court has adopted this doctrine. *Gessler v. Grieb,* 80 Wis. 21, 48 N. W. 1098; *Listman M. Co. v. Wm. List-*

man M. Co. 88 Wis. 334, 60 N. W. 261. This principle protects the plaintiff here because his invented word was arbitrary and fanciful and did not describe the quality of the article or its ingredients, but was merely suggestive that carbon or coal had something to do with it. It would be impossible to hold that the word even suggests "oleum" or oil.

The appellant claims that the sale of the article under this name for ten years has made the word descriptive and deprived the plaintiff of the fruits of his ingenuity and business sagacity. With reference to this contention it is well said in *Selchow v. Baker,* 93 N. Y. 60 (cited with approval in *Gessler v. Grieb, supra*):

"It cannot be true as a general proposition . . . that when a manufacturer has given to his products a new name invented by himself for the purpose of distinguishing them as his, and the article becomes generally known to the trade and to the public by that name, the name becomes public property and every one has a right to use it. That proposition can be sustained only in respect to names which are descriptive of the article and incapable of being appropriated as trade-marks. The value of a trade-mark consists in its becoming known to the trade as the mark of the manufacturer who has invented or adopted it and in being known to the public as the name of an article which has met with popular favor. It cannot be that the very circumstances which give it value operate at the same time to destroy it."

The words "Cocaine," "Cottolene," "Valvoline," and "Saponifier" are precisely parallel to the word "Carbolineum." All are arbitrary words, coined by the maker of a compound as a name for his special product, suggestive but not descriptive, and all have been sustained as valid trade-marks. In the *Cottolene Case* it is said (*N. K. Fairbank Co. v. Central L. Co.* 64 Fed. 133):

"It is well settled that the inventor of an arbitrary or fanciful name may apply it to an article manufactured by him to distinguish his manufacture from that of others, and that the

subsequent use of such word by the public to denote the article does not deprive the originator of such word of his exclusive right to its use."

To the same effect are the cases of *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 32 Fed. 94, and *Celluloid Mfg. Co. v. Read,* 47 Fed. 712.

Both upon principle and authority it seems that the trial court was right in its conclusions.

ILLINOIS STEEL COMPANY, Appellant, vs. BUDZISZ and others, Respondents.

January 28—May 11, 1909.

Title: Adverse possession: Statutes: Landlord and tenant: Transition of title: Possession of purchaser from tenant: Trespass: Disseisin: Presumptions: Rules of evidence: Estoppel.

1. Under the provisions of secs. 4210, 4211, Stats. (1898)—defining adverse possession and its effect,—if A., having possession of real estate as tenant of B., the owner, in writing conveys the same to C., he having no notice of the relation of landlord and tenant as between A. and B., and C., under his conveyance, takes possession of the property, claiming title by no right except that purporting to be conferred by his writing, and remains in possession as an exclusive owner might, continuously for the full statutory period, C. thereby acquires title in fact, good as against the former owner B., regardless of the relations existing between A. and B. at the time C. obtained his conveyance, or the provisions of sec. 4216.

On motion for a rehearing: Syllabus by MARSHALL, J.

2. The fundamentals of title by adverse possession for this state are embodied in the written law.
3. The common-law principles embodied in sec. 4216, Stats. (1898), with a ten-year limitation that neither a tenant nor any person claiming under him can efficiently claim possession adverse to the landlord, are subordinate to the statute rendering actual adverse possession for ten or twenty years, according to circumstances, efficient to accomplish a transition of title from the holder of the legal title to the adverse possessor.

4. A possession of realty, characterized by the relations of landlord and tenant between the possessor and the owner, may be turned into adverse possession by a grantee of the tenant without termination of such relations by actual surrender to such owner.
5. A grantee of a tenant may terminate the relations of landlord and tenant and supersede them by adverse possession by such acts as will disseise the landlord actually or constructively.
6. Whenever the grantee of a tenant takes possession of the granted premises as owner under such circumstances as to bring home to the owner, if he pays reasonable attention to his affairs, knowledge of the defiance of his right, such grantee becomes a trespasser.
7. In the circumstances last stated, the owner cannot, at his election, treat the trespasser as his tenant. His legal remedy for the wrong is in trespass or ejectment.
8. When the condition stated in No. 6 shall have been created, full disseisin, efficiently initiating adverse possession under the written law, will be effected.
9. If the owner, in the circumstances last stated, permits the condition of disseisin to continue for the statutory period under sec. 4215, Stats. (1898), the presumption in his favor under sec. 4210 as possessor of the legal title, and under sec. 4216 of the statutes as to subordination of the possession to that of the true owner, will be superseded by the verity as to continuous disseisin for the statutory period requisite to a transition of the title to the disseisor.
10. The statutory rule under sec. 4216, Stats. (1898), that possession of realty by a grantee of a tenant is to be deemed the possession of the landlord, is not a legal or an equitable estoppel, but a rule of evidence to prevail till overcome by other evidence to the contrary, the same as the evidentiary rule under sec. 4210 and that under secs. 4211 and 4213, Stats. (1898).
11. Secs. 4210, 4211, 4213, 4215, and 4216, Stats. (1898), make this Code system for the establishment of title: Starting with the common-law rule that proof of actual possession *prima facie* proves title; that is subject to displacement under the first section by proof of legal title in the adversary of the possessor; that is subject to displacement by actual possession under color of title for ten years under the second section, or without such color for twenty years, under the third section; that is subject to displacement under the fifth section by proof that the possession commenced under the owner by creation of the relations of landlord and tenant; and that is subject to conclusive displacement under the fourth section by proof that after the

relations aforesaid commenced they were superseded by a disseisin as indicated in No. 6 and a continuation thereof for the statutory period as suggested in No. 9.

12. If a person takes possession of premises as owner under a conveyance, in form, in fee from a tenant the nature of his possession, as to whether adverse or subordinate to the right of the true owner, is referable to his deed and the circumstances characterizing his conduct, as to whether such as to challenge the attention of the owner of the defiance of his right, not to the real right of the grantee.

BARNES and TIMLIN, JJ., dissent.

APPEAL from a judgment of the circuit court for Milwaukee county: OREN T. WILLIAMS, Circuit Judge. *Affirmed.*

Action in ejectment.

The issues litigated upon the trial concerned, in the main, whether defendant *August Budzisz* was, at the time of the commencement of the action, the owner of the premises in dispute by reason of having been for ten years theretofore, uninterruptedly, in adverse possession thereof, under claim of title exclusive of any other right, founding such claim upon a written instrument as being a conveyance of the premises, satisfying all the essentials of title by adverse possession under secs. 4210, 4211, 4212, 4215, Stats. (1898). No other issue and no other question, except such as bear on that issue, need be considered on the appeal.

There was evidence on the following points: July 1, 1887, Frank Otto, being possessed of the disputed premises, the then owner of the paper title duly leased in writing the same to him for a period of five years, at a yearly rental of $3, payable in advance, the lessee being privileged to remove all buildings, erected by him before or during the term, within six months from the date of service upon him of notice to vacate, as provided in the lease. The lease was signed by both parties thereto, and fully executed in every respect, and the relations of landlord and tenant between the parties were duly established. The same existed at the time of the conveyance to *August Budzisz,* hereafter stated, but not to his knowledge.

Plaintiff succeeded to the paper title to the property before the commencement of this action and was the owner thereof, except as affected by defendants' rights, ever thereafter. In August, 1887, by deed in form, as defendants claimed, Otto conveyed the premises to *August Budzisz,* he being ignorant of the relation of the grantor of the property, as before indicated. The only conveyance to said *Budzisz,* as plaintiff claimed, was of the building and removable improvements. The instrument of conveyance was not produced upon the trial. Such circumstances were established, in the judgment of the circuit court, as rendered parol proof of the contents of the instrument proper, and such proof, competent as the court ruled, was admitted.

The jury decided in defendants' favor, on all points essential to title in *August Budzisz* by adverse possession, unless the relations of landlord and tenant between Otto and the owner of the patent title were impressed upon the rights obtained by *Budzisz,* perpetuating the same, as between him and such owner, and continuing into, if not through, the claimed period of adverse possession.

Judgment was rendered in defendants' favor on the verdict, the question of law being decided in their favor. The plaintiff appealed.

For the appellant there was a brief by *John H. Paul* and *Kronshage, McGovern & Fritz,* attorneys, and *Walter D. Corrigan,* of counsel, and a supplemental brief signed *John H. Paul, Kronshage, McGovern, Goff, Fritz & Hannan,* attorneys, and *Walter D. Corrigan,* of counsel, and oral argument by *O. M. Fritz* and *Theodore Kronshage.* They contended, *inter alia,* that the court committed an error in disregarding the elementary rules (a) that a lessee can neither deny the title of lessor nor claim to hold possession adversely to him; (b) that by accepting possession under a lease a tenant recognizes the title and possession of the lessor and is estopped to dispute either; (c) and that when once this relation of land-

lord and tenant is established it attaches to all succeeding to the possession through or under the lessee, and such successor is bound by the acts of his predecessor. Sec. 4216, Stats. (1898); 1 Cyc. 1058, 1059; 1 Am. & Eng. Ency. of Law (2d ed.) 810, 811; *Pulford v. Whicher,* 76 Wis. 555; *Emerick v. Tavener,* 9 Grat. 220, 223, 58 Am. Dec. 217; *Quinn v. Quinn,* 27 Wis. 168, 170; *Johnson v. Tucker,* 136 Wis. 505, 117 N. W. 1002; *Jackson v. Davis,* 5 Cow. 123, 129; *Jackson v. Scissam,* 3 Johns. 499; *Tompkins v. Snow,* 63 Barb. 525, 533; *Tilghman v. Little,* 13 Ill. 239, 241; *Doty v. Burdick,* 83 Ill. 473, 477; *Phillips v. Rothwell,* 4 Bibb, 33; *Campbell v. Shipley,* 41 Md. 81; *Standley v. Stephens,* 66 Cal. 541, 6 Pac. 420; *Bannon v. Brandon,* 34 Pa. St. 263, 75 Am. Dec. 655; *Church v. Shultes,* 38 N. Y. Supp. 842; *Cooper v. Smith,* 8 Watts. 536; *Anderson v. Darby,* 1 Nott & McC. 369; *Thompson v. Felton,* 54 Cal. 547; *Harker v. Gustin,* 7 Halst. 42; *Church v. Schoonmaker,* 115 N. Y. 570; *Whiting v. Edmunds,* 94 N. Y. 309, 314; *De Lancey v. Ganong,* 9 N. Y. 9; *Jackson v. Davis,* 5 Cow. 123, 129; *Sands v. Hughes,* 53 N. Y. 287, 293; *Bedlow v. N. Y. F. D. D. Co.* 112 N. Y. 263, 287; *Bradt v. Church,* 110 N. Y. 537, 543. The court erred in holding the vague and flimsy evidence of defendants sufficient to establish the existence and contents of "some written instrument as being a conveyance of the premises in question." *Edwards v. Noyes,* 65 N. Y. 125, 126; *Day v. Philbrook,* 89 Me. 462; *S. C.* 85 Me. 90; *Bennett v. Waller,* 23 Ill. 97, 181; *Renner v. Bank of Columbia,* 9 Wheat. 581; *Appeal of Richards,* 122 Pa. St. 547; *Wakefield v. Day,* 41 Minn. 344, 43 N. W. 71; *Laster v. Blackwell,* 128 Ala. 143; *Potts v. Coleman,* 86 Ala. 94; *Elyton L. Co. v. Denny,* 108 Ala. 553; *Dagley v. Black,* 197 Ill. 53. It is well established that a conveyance can be color of title only as to the land actually included—because actually described—in it. The calls of a deed limit the right as a matter of law. *Ill. S. Co. v. Budzisz,* 106 Wis. 499, 513; *Hanna v. Palmer,* 194 Ill. 41,

44; *Shackleford v. Bailey,* 35 Ill. 387; *Allmendinger v. McHie,* 189 Ill. 308, 311; *Brooks v. Bruyn,* 35 Ill. 392; *Ohio & M. R. Co. v. Barker,* 125 Ill. 303; *Graeven v. Dieves,* 68 Wis. 317; *Childs v. Nelson,* 69 Wis. 125, 135; *Sydnor v. Palmer,* 29 Wis. 226, 252; *Pepper v. O'Dowd,* 39 Wis. 538, 548; *McCann v. Welch,* 106 Wis. 142, 147; *McMillan v. Wehle,* 55 Wis. 685; *Whittlesey v. Hoppenyan,* 72 Wis. 140; *Sanborn v. French,* 22 N. H. 246; *Perry v. Perry,* 99 N. C. 270; *Williamson v. Tison,* 99 Ga. 791, 792; *Etowah, etc. M. Co. v. Parker,* 73 Ga. 51, 53; *Barker v. Southern R. Co.* 125 N. C. 598; *Davidson v. Arledge,* 88 N. C. 326; *Smith v. Fite,* 92 N. C. 319; *King v. Wells,* 94 N. C. 344; *Wheeler v. Spinola,* 54 N. Y. 377, 389; *Simpson v. Johnson* (Tex. Civ. App.) 44 S. W. 1076; *Goltermann v. Schiermeyer,* 111 Mo. 404; *Marshall v. Corbett,* 137 N. C. 555; *Newton v. Alexander* (Tex. Civ. App.) 44 S. W. 416; *Wilson v. Johnson,* 145 Ind. 40, 43 N. E. 930; *Bellows v. Jewell,* 60 N. H. 420; *Nichols v. New Eng. F. Co.* 100 Mich. 230; *Wray v. C., B. & Q. R. Co.* 86 Ill. 424; *Dubuque v. Coman,* 64 Conn. 475; *Louisville & N. R. Co. v. Boykin,* 76 Ala. 560; *Juneman v. Franklin,* 67 Tex. 411. In the following cases the descriptions as proved were held insufficient to constitute color of title: *Masterson v. Todd,* 6 Tex. Civ. App. 131, 24 S. W. 682; *Willis v. Burke,* 7 Tex. Civ. App. 239, 240, 27 S. W. 217; *Dickens v. Barnes,* 79 N. C. 490; *Cook v. Oliver,* 83 Tex. 559, 561, 19 S. W. 161; *Davis v. Stroud,* 104 N. C. 484, 10 S. E. 666; *Sydnor v. Palmer,* 29 Wis. 226, 252; *Sheppard v. Wilmott,* 79 Wis. 15; *Dhein v. Beuscher,* 83 Wis. 316; *Ablard v. Fitzgerald,* 87 Wis. 516; *Allis v. Field,* 89 Wis. 327; *Elofrson v. Lindsay,* 90 Wis. 203; *Fuller v. Worth,* 91 Wis. 406; *Ryan v. Schwartz,* 94 Wis. 403, 69 N. W. 178; *Pohlman v. Evang. L. T. Church,* 60 Neb. 364, 83 N. W. 201; *Evans v. Welch,* 29 Colo. 355, 68 Pac. 776, 779; *Messer v. Hibernia S. & L. Soc.* 149 Cal. 122, 84 Pac. 837; *Patton v. Smith,* 171 Mo. 231, 71 S. W. 187; *Albert Hanson L. Co. v. Angelloz,* 118

La. 861, 43 South. 529; *Cobb v. Simon,* 119 Wis. 597, 605. The court erred in admitting in evidence and refusing to strike out portions of a bill of exceptions in another case against other defendants not in privity with defendants herein. *Ill. S. Co. v. Bilot,* 109 Wis. 418; *Dunck v. Milwaukee Co.* 103 Wis. 371; *McGeoch v. Carlson,* 96 Wis. 138, 140; *Yale v. Comstock,* 112 Mass. 267; *Costigan v. Lunt,* 127 Mass. 354; *Howard v. Patrick,* 38 Mich. 795; *Deering v. Schreyer,* 88 App. Div. 457; *Loughry v. Mail,* 34 Ill. App. 523; *Charlesworth v. Tinler,* 18 Wis. 633, 635; *Norris v. Monen,* 3 Watts, 465; *Mygatt v. Coe,* 124 N. Y. 212, 11 L. R. A. 646; *Sherin v. Brackett,* 36 Minn. 152, 30 N. W. 551; *Boughton v. Van Valkenburgh,* 61 N. Y. Supp. 574; *Patton v. Pitts,* 80 Ala. 373; *Hartley v. Phillips,* 198 Pa. St. 9, 47 Atl. 929; *Ill. S. Co. v. Budzisz,* 106 Wis. 499, 507–509. The court erred in excluding on cross-examination and for the purpose of impeachment statements and admissions against interest made by defendant during the course of a second adverse examination. *Phipps v. Wis. Cent. R. Co.* 133 Wis. 153, 113 N. W. 456; *Lilley v. Mut. Ben. L. Ins. Co.* 92 Mich. 153, 52 N. W. 631; *McGahan v. Crawford,* 47 S. C. 566, 578; *Carr v. Griffin,* 44 N. H. 510; *State v. Flynn,* 36 N. H. 64, 70; *Carter v. Beals,* 44 N. H. 408; *Smith v. Beadnell,* 1 Camp. 30; *Stockfleth v. De Tastet,* 4 Camp. 10; *Chase v. Debolt,* 2 Gilm. 371, 373; *Congleton v. Schreihofer* (N. J.) 54 Atl. 144; *Parker v. Chancellor,* 78 Tex. 524; *Chaddick v. Haley,* 81 Tex. 617, 620. There was like error regarding admissions made by him during the course of a first adverse examination which defendant refused to sign. *Clarke v. Sawyer,* 3 Sandf. Ch. 351; *Looker v. Looker,* 46 Mich. 68; *Mobley v. Hamit,* 1 A. K. Marsh. 590.

For the respondents there was a brief by *Fiebing & Killilea,* attorneys, and *Moritz Wittig* and *Henry J. Killilea,* of counsel, and oral argument by *Mr. Killilea* and *Mr. Wittig.* They contended, *inter alia,* that the defendant was not es-

topped by the alleged lease even if defendant or his predecessor had entered into possession under it. *Miller v. M'Brier,* 14 Serg. & R. 382, 384. Otto, defendant's predecessor, having been in possession of the premises for five years prior to the alleged lease, and neither he nor defendant having entered thereunder, defendant is not estopped from disputing the title of the plaintiff. *Ackerman v. Lyman,* 20 Wis. 454; *Central M. Co. v. Hart,* 124 Mass. 123, 125; *Preston v. Hawley,* 101 N. Y. 586, 588; *Congregation v. Miles,* 4 Watts, 146, 152; *Hamilton v. Marsden,* 6 Binn. 45; *Miller v. M'Brier,* 14 Serg. & R. 384; *Moore v. Smead,* 89 Wis. 558; *Quinn v. Quinn,* 27 Wis. 168; *Watts v. Owens,* 62 Wis. 512; *McCann v. Welch,* 106 Wis. 142; *Sizer v. Clark,* 116 Wis. 534; *Pulford v. Whicher,* 76 Wis. 555; *Emerick v. Tavener,* 9 Grat. 220, 224; *Miller v. Williams,* 15 Grat. 213, 222; *Swann v. Thayer,* 36 W. Va. 46, 52; *Lakin v. Dolly,* 53 Fed. 333, 339, 340; *Tewksbury v. Magraff,* 33 Cal. 237, 241; *Shultz v. Elliott,* 11 Humph. 183, 187; *Hammons v. McClure,* 85 Tenn. 65, 2 S. W. 37; *Swift v. Dean,* 11 Vt. 323, 34 Am. Dec. 693; *Carter v. Marshall,* 72 Ill. 609; Bigelow, Estoppel, 399, 409, 427; *Reynolds v. Iron S. M. Co.* 116 U. S. 687, 688; *Doolan v. Carr,* 125 U. S. 618, 629; *Gleim v. Rise,* 6 Watts, 44; *Hayne v. Maltby,* 3 Term R. 438, 441; *Jackson v. Rowland,* 6 Wend. 666; *Phillips v. Pearce,* 5 B. & C. 433; *Reay v. Cotter,* 29 Cal. 168; *Cornish v. Searell,* 8 B. & C. 471; *Glen v. Gibson,* 9 Barb. 634, 638; *McConnell v. Bowdry's Heirs,* 4 B. Monr. 392; *Jackson v. Ayers,* 14 Johns. 224; *Hall v. Butler,* 10 Ad. & El. 204; *Ingraham v. Baldwin,* 9 N. Y. 45; *Brown v. Dysinger,* 1 Rawle, 408; *Swift v. Dean,* 11 Vt. 323, 325; *Chettle v. Pound,* 1 Ld. Raym. 746; *Rogers v. Pitcher,* 6 Taunt. 202; *Gravenor v. Woodhouse,* 1 Bing. 38; *Jackson v. Cuerden,* 2 Johns. Cas. 353; *Jackson v. Spear,* 7 Wend. 401; *Davis v. McGrew,* 82 Cal. 135; *Baldwin v. Temple,* 101 Cal. 396; *Hall v. Benner,* 1 Pen. & W. 402, 21 Am. Dec. 394; *Berridge v. Glassey*

(Pa.) 7 Atl. 749; *Hockenbury v. Snyder,* 2 Watts & S. 240, 249; *Baskin v. Seechrist,* 6 Pa. St. 154, 163; *Mays v. Dwight,* 82 Pa. St. 462, 464; *Hamilton v. Marsden,* 6 Bin. 45; *Brown v. Dysinger,* 1 Rawle, 408, 415; *Koontz v. Hammond,* 62 Pa. St. 177; *Cramer v. Carlisle Bank,* 2 Grant, 267; *Washington v. Conrad,* 2 Humph. 562; *Hammons v. McClure,* 85 Tenn. 65, 2 S. W. 37; *James v. Patterson,* 1 Swan, 309, 55 Am. Dec. 737; *Vance v. Johnson,* 10 Humph. 214, 219; *Redmond v. Bowles,* 5 Sneed, 547, 552; *Fain v. Headerick,* 4 Coldw. 327, 334; *Gudger v. Barnes,* 4 Heisk. 570; *Shew v. Call,* 119 N. C. 450; *England v. Slade,* 4 T. R. 682; *Doe v. Ramsbotham,* 3 Maule & S. 516; *Rogers v. Pitcher,* 1 Marsh. 541; *Phillips v. Smoot,* 1 Mackey, 478; *Blankenship v. Blackwell,* 124 Ala. 355, 82 Am. St. Rep. 175, 27 South. 551; *Fuller v. Sweet,* 30 Mich. 237, 240, 241; *Clary v. O'Shea,* 72 Minn. 105, 75 N. W. 115; *Petterson v. Sweet,* 13 Ill. App. 255; *Claridge v. Mackenzie,* 4 M. & G. 143; *Evans v. Bidwell,* 76 Pa. St. 497; *Anderson v. Smith,* 63 Ill. 126, 127; *Chandler v. White,* 84 Ill. 435, 436; *Flower v. Elwood,* 66 Ill. 438, 447; *Davidson v. Young,* 38 Ill. 145, 152; *Gregory v. Doidge,* 3 Bing. 474; *Jew v. Wood,* Craig & P. 185; *Franklin v. Merida,* 35 Cal. 558; *Ireton v. Ireton,* 59 Kan. 92, 52 Pac. 74; *Sands v. Hughes,* 53 N. Y. 287, 289; *Chase v. Dearborn,* 21 Wis. 57, 61; *Drake v. Cunningham,* 111 N. Y. Supp. 199; *Bedlow v. N. Y. F. D. D. Co.* 112 N. Y. 263; *Jones v. Reilly,* 174 N. Y. 97; *McAusland v. Pundt,* 1 Neb. 211, 249. Even if plaintiff had title, defendant was not estopped from showing he entered into possession under color of title and held adversely for the statutory period. *Lawton v. Howe,* 14 Wis. 241, 247; *De Pere Co. v. Reynen,* 65 Wis. 271, 274, 275; 1 Cyc. 1060, 1061; *Dikeman v. Parrish,* 6 Pa. St. 210, 225, 47 Am. Dec. 455; *Townsend v. Boyd,* 217 Pa. St. 386; *Lampman v. Van Alstyne,* 94 Wis. 417, 429; *McCann v. Welch,* 106 Wis. 142, 148; *Hatch v. Lusignan,* 117 Wis. 428; *Swann v.*

Thayer, 36 W. Va. 46, 52; *State v. Lloyd,* 133 Wis. 468, 473; *Reitler v. Lindstrom,* 126 Wis. 562, 565; *Ill. S. Co. v. Bilot,* 109 Wis. 418; *Ill. S. Co. v. Budzisz,* 119 Wis. 580, 585; *Ill. S. Co. v. Jeka,* 123 Wis. 419, 428; *Pitman v. Hill,* 117 Wis. 318; *Wollman v. Ruehle,* 104 Wis. 603, 606; *Kurz v. Miller,* 89 Wis. 426, 433; *Bartlett v. Secor,* 56 Wis. 520, 530; *Meyer v. Hope,* 101 Wis. 123, 128; *Pepper v. O'Dowd,* 39 Wis. 538, 543; *Quinn v. Quinn,* 27 Wis. 168; *Watts v. Owens,* 62 Wis. 512; *Moore v. Smead,* 89 Wis. 558, 564; *Sizer v. Clark,* 116 Wis. 534, 541; *Smith v. C., M. & St. P. R. Co.* 124 Wis. 120, 123; *Peyton v. Stith,* 5 Pet. 485, 492; *Waldon v. Bodley,* 14 Pet. 156, 162; *Ricard v. Williams,* 7 Wheat. 59, 117; *Roberts v. Decker,* 120 Wis. 102, 109; *Ackerman v. Lyman,* 20 Wis. 454; *Willison v. Watkins,* 3 Pet. 43, 49; *Lawton v. Howe,* 14 Wis. 241, 247; *Gunsolus v. Lormer,* 54 Wis. 630, 631, 632; *Hamachek v. Duvall,* 135 Wis. 108, 115 N. W. 634; *Holridge v. Gillespie,* 2 Johns. Ch. 30, 33; *Galloway v. Finley,* 12 Pet. 264; *Wilson v. Smith,* 5 Yerg. 379, 398; *Officer v. Murphy,* 8 Yerg. 502; *Morgan's Heirs v. Boone's Heirs,* 4 B. Mon. 291; *Connelly's Heirs v. Chiles,* 2 A. K. Marsh. 242; *Thredgill v. Pintard,* 12 How. 24; *Jackson v. Vincent,* 4 Wend. 633; *Jackson v. Collins,* 11 Johns. 1; *De Lancey v. Ganong,* 9 N. Y. 9; *Jones v. Reilly,* 174 N. Y. 97; *Roebke v. Andrews,* 26 Wis. 311; *Lamoreux v. Huntley,* 68 Wis. 24, 30, 33, 31 N. W. 331; *Griswold v. Nichols,* 126 Wis. 401, 403, 105 N. W. 815; *Evans v. Enloe,* 70 Wis. 345. The court did not err in excluding the alleged first and second adverse examinations had under sec. 4096, Stats. (1898). Ch. 29, Laws of 1899; ch. 244, Laws of 1901; ch. 367, Laws of 1907; *Phipps v. Wis. Cent. R. Co.* 133 Wis. 153; *First Nat. Bank v. Wood,* 26 Wis. 500, 503; *Smith v. C., M. & St. P. R. Co.* 124 Wis. 120, 123, 124; *Stockfleth v. De Tastet,* 4 Camp. 10, 11; *Robson v. Alexander,* 1 M. & P. 448, 452; *Groenvelt v. Burrell,* 1 Ld. Raym. 253; *Legatt v. Tollervey,* 14 East, 302; *Smith v. Beadnell,*

1 Camp. 30; *Eisenmeyer v. Sauter,* 77 Ill. 515; 4 Ency. of Ev. 431, 432; *Shepherd v. Snodgrass,* 47 W. Va. 79, 34 S. E. 879; *Herman v. Schlesinger,* 114 Wis. 382; *Ferguson v. Truax,* 136 Wis. 637, 118 N. W. 251; *Williams v. Brown,* 137 Mich. 569, 100 N. W. 786, 787; *Shephard v. State,* 88 Wis. 185; *Hughes v. C., St. P., M. & O. R. Co.* 122 Wis. 258, 269; 1 Am. & Eng. Ency. of Law (2d ed.) 716, n. 3; *Schearer v. Harber,* 36 Ind. 536; *People v. Lee Ah Yute,* 60 Cal. 95; *State v. Noyes,* 36 Conn. 80; *Eingartner v. Ill. S. Co.* 103 Wis. 307. Alleged admissions having been made after the plaintiff had title under the statute of limitation, such admissions are inadmissible because of the statute of frauds and because the defendant had a vested right in the property. *Byers v. Shepler* (Pa.) 7 Atl. 182; *Rennert v. Shirk,* 163 Ind. 542, 72 N. E. 546; *Lee v. Thompson,* 99 Ala. 95, 11 South. 672; *Hudson v. Stillwell,* 80 Ark. 575, 98 S. W. 356, 367; *Shirey v. Whitlow,* 80 Ark. 444, 97 S. W. 444, 445; *Lemmons v. McKinney,* 162 Mo. 525, 63 S. W. 92, 94; *Hedges v. Pollard,* 149 Mo. 216, 50 S. W. 889, 892; *Ill. Cent. R. Co. v. Wakefield,* 173 Ill. 564, 50 N. E. 1002; *Summerfield v. White,* 54 W. Va. 311, 46 S. E. 154, 159; *Todd v. Weed,* 84 Minn. 4, 86 N. W. 756. The premises in question being in the bed of the river at the time the patent was issued, plaintiff obtained no title. *Ill. S. Co. v. Budzisz,* 115 Wis. 68. The deposition of Mr. Jones being part of the bill of exceptions in the *Bilot Case,* 109 Wis. 418, was admissible in evidence. *Charlesworth v. Tinker,* 18 Wis. 633, 635; 16 Cyc. 1091; 1 Greenl. Ev. (16th ed.) sec. 163*a; Kreuger v. Sylvester,* 100 Iowa, 647, 652.

The following opinion was filed February 16, 1909:

MARSHALL, J. These are assigned as errors:

(1) The court refused to grant a nonsuit, though it appeared that *Budzisz* was a mere successor to the title of appellant's tenant Otto;

(2) Parol testimony was allowed, and held sufficient, to prove the contents of the deed to *Budzisz;*

(3) Improper evidence was permitted which was prejudicial to appellant;

(4) Evidence offered by appellant was improperly excluded;

(5) Improper questions were included in the special verdict;

(6) Erroneous instructions were given to the jury.

Some other errors were assigned, but those stated sufficiently show the claims of appellant as to all matters requiring attention in deciding the appeal.

The entire field covered by the specified claims of appellant has been examined in detail without discovering any but one question which will reasonably bear discussion to any great length.

There have been very many of these cases. In the whole, almost every conceivable question relating to adverse possession and title based thereon has been discussed, elucidated, and decided. It is useless to go over any of them again, any more than incidentally, if at all. When the effect of statutes relating to the title to realty has been definitely judicially declared, the less said on the subject thereafter, by way of rediscussing the matter, the better. Frequent rediscussion of settled principles with new formulations of the legal rules involved, is liable to create confusion where none need, and it is of the utmost importance that none should, exist. From new discussions of principles, laid aside as settled, variations are liable to be discovered, leading to new or promoting old litigation, when no variation was intended.

The foregoing preface, perhaps, will be taken as a sufficient excuse, if any were needed, for not treating the numerous detail errors grouped under the six heads in this opinion, or the groups in detail. Some of the matters discussed are of little moment and some are substantial. None have been over-

looked, but none will be specially discussed except the one involved in the proposition hereafter stated. Such proposition is touched by several of the groups of assigned errors, but only so as to raise the single question.

Unless there is something fatal to the judgment involved in the proposition, the judgment must be affirmed. All questions otherwise, in the opinion of the court, are free from difficulty and must be resolved in respondents' favor.

This is the proposition which overshadows all others. The affirmative of it is strenuously contended for by the learned counsel for the appellant, while respondents' counsel just as strenuously contend for the negative. If the former is right the judgment must be reversed. If the latter is right it must be affirmed.

If A., having possession of real estate as tenant of B., the owner, conveys the same in writing to C., he having no notice of the relation of landlord and tenant as between A. and B., and C., under his conveyance, takes possession of the property, claiming title by no right except that purported to be conferred by his writing, and he remains in such possession as an exclusive owner might, continuously for the full period of ten years,—does he thereby acquire title in fact, good as against the former owner B., regardless of the relations existing between the latter and A., at the time he obtained his conveyance?

The learned counsel for appellant points to sec. 4216, Stats. (1898), providing that "whenever the relation of landlord and tenant shall have existed between any persons the possession of the tenant shall be deemed the possession of the landlord until the expiration of ten years from the termination of the tenancy," etc., as if the relation of landlord and tenant, having been created, will continue as to the tenant and his successors in possession till possession shall have been delivered to the one from whom it was first obtained, actually or constructively. On that *Pulford v. Whicher*, 76 Wis. 555,

45 N. W. 418; *Church v. Schoonmaker,* 115 N. Y. 570, 22 N. E. 575; *Whiting v. Edmunds,* 94 N. Y. 309; *Bedlow v. New York F. D. D. Co.* 112 N. Y. 263, 287, 19 N. E. 800, and similar cases.

The case cited from our own decisions does not seem to have the remotest bearing on the proposition to be decided. Possession was obtained of the lessee by fraud, for the very purpose of commencing adverse possession, not under conveyance by the tenant in writing, or really any conveyance by him at all, but under a tax deed and through a fraudulent surrender of the landlord's possession, in which the one going out and the one going in participated. Under those circumstances the court, upon equitable considerations, decided that possession of the landlord did not change, but ran against the tax deed, instead of in favor thereof, under the statute of limitations respecting such deeds.

Whiting v. Edmunds, supra, is no more in point as we view it. The adverse claimant, as in *Pulford v. Whicher, supra,* did not enter, or claim possession, under a deed from the tenant. He obtained a spurious deed from a stranger, then obtained possession by obtaining an assignment of the leasehold interest, and entered ostensibly by virtue of such assignment. That is, he took possession in fact, as successor of the tenant, and then sought to raise the flag of an adverse possessor, under his spurious deed. How far that is from our proposition we need not delay to point out. It is too manifest. The learned court in the discussion, partly *obiter,* indulged in some remarks, particularly by reference to the ancient case of *Jackson v. Scissam,* 3 Johns. 499, which, if authority at all, would support the appellant's contention; but it is not. Statutes of limitation with the effect given thereto as in this state were not referred to or involved. The court formulated the extreme rule adverted to, which, as seen, had nothing to do with the case, and referred to the ancient case of *Jackson v. Scissam, supra,* which merely declared and applied a common-law rule.

The other cases cited furnish no more satisfactory light. They are all based on the common-law principle that a tenant cannot impeach the title of his landlord, and that he who takes under a tenant merely succeeds to the tenancy relation. That is familiar as a general common-law principle and is applicable so far as not abrogated by statute. It was enforced, at common law, as regards title by adverse possession. It has been incorporated into the statutes at sec. 4216, but not so as to go beyond the letter of the written law and defeat other plain statutes. No one will claim that, in its letter, the statute goes further than to affect tenants at first hands, so to speak, and those taking under them as tenants. The words "whenever the relation of landlord and tenant shall have existed between any persons the possession of the tenant shall be deemed the possession of the landlord," etc., if applied to any other than a tenant in fact, extended by mere construction to include a possessor under the tenant not as such, but as owner, the grantee having no knowledge of the tenancy, ingrafting the common-law rule upon the statute, when by proper rules for construction it was abrogated by not being incorporated in the statute, and the same method of dealing with statutes be persisted in as to our other plain written laws affecting realty,—the result would be to defeat the very purpose of the statute makers, as will be seen.

Sec. 4211 declares, as plainly as by words it could well be done, that if one takes possession of realty, claiming the same under a written instrument, as being a conveyance thereof to him, and exclusive of any other right, he becomes an adverse possessor. It admits of no exception in its letter. This court has said, it admits of no exception by construction; that it was phrased as we find it, in order that it might be understood easily, of all men, as eliminating the ancient doctrine that the person taking possession must do so in good faith.

We said that the question of good faith is not involved under our system, as it was at common law, simply because it is not found in the words of the statute. *Lampman v. Van Al-*

styne, 94 Wis. 417, 427, 69 N. W. 171. An examination of that case shows that in the early decisions of this court it was not appreciated that the plain wording of the statute, leaving out some of the common-law characteristics of adverse possession, was for the very purpose of abrogating them.

Speaking of the question raised in that case on the subject the court said:

"There is no middle ground that can be resorted to on this subject. Good faith is an essential element of adverse possession under the statutes of limitation, or it is not. The controversy should be tested and determined by the language of the statutes. We do not find it there in any literal expression,—anything to warrant a departure from the plain import of the words used. . . . The statutes of limitation are statutes of repose, and their purpose should not be impaired by injecting into them by judicial construction elements that are not there."

In that plain language, it would seem, the court declared that our statutes of limitation, appertaining to real estate, are to be administered according to their letter, all common-law features of adverse possession not found therein expressed in such letter, to be regarded as abrogated. That doctrine is now more than twelve years old. It has been iterated and reiterated so many times and so many cases have been ruled by it, that it has become a rule of property, upon which all should feel that they may safely depend.

What feature was there that inhered in the doctrine of adverse possession, at the common law, more significant than the one that the entry was required to be characterized by good faith? It was much more significant, we should say, than the one upon which counsel for appellant rely. How can we say one is not retained, because not found in the letter, and say, in the same breath, that the other, not so found, is retained? How can we solemnly declare, and adhere to the declaration for a long series of years, that all common-law features of adverse possession not found plainly expressed in

the statutes, are to be regarded as having been considerately excluded, because not included, and in the next breath say that some one of them was included, and endeavor to make it logical by referring to decisions elsewhere? Counsel for appellant has failed to satisfy us.

The rule adopted here, as stated, has been affirmed in cases too numerous to mention. They have been so significant as to be very familiar. The following are but a very small fraction of them: *McCann v. Welch,* 106 Wis. 142, 81 N. W. 996; *Ill. S. Co. v. Budzisz,* 106 Wis. 499, 507–520, 81 N. W. 1027, 82 N. W. 534; *Frye v. Highland,* 109 Wis. 292, 85 N. W. 351; *Ill. S. Co. v. Bilot,* 109 Wis. 418, 428–446, 84 N. W. 855, 85 N. W. 402; *Pitman v. Hill,* 117 Wis. 318, 322, 94 N. W. 40; *Ill. S. Co. v. Budzisz,* 119 Wis. 580, 97 N. W. 166; *Clithero v. Fenner,* 122 Wis. 356, 361, 99 N. W. 1027; *Reitler v. Lindstrom,* 126 Wis. 562, 565, 106 N. W. 388; *State v. Lloyd,* 133 Wis. 468, 473, 113 N. W. 964; *Batz v. Woerpel,* 113 Wis. 442, 89 N. W. 516.

Counsel point to decisions elsewhere, using language to the effect that one claiming under another who is but a mere tenant, takes no greater right than the permissive privilege of his grantor, no matter whether he takes knowing the facts or not knowing of them,—not appreciating that such doctrine is based on the supposition that good faith is essential to adverse holding and that bad faith of the grantor necessarily attaches and characterizes the possession of the grantee however remote,—which element of good faith is not required by our statute either in its letter or its spirit.

Many courts have fallen into confusion, as shown in *Lampman v. Van Alstyne,* 94 Wis. 417, 69 N. W. 171, by tying to decisions based on common-law principles, even where elements, other than those called for by the statutory system, were intended to be excluded, and other decisions in states where such elements, particularly that of good faith, are by plain language retained. When we appreciate the clear pur-

pose of our early workers in the field of constructive legislation, and give effect to it, not bending words out of their plain signification to avoid supposed hardship, possible under the new system, the proper course to pursue seems plain.

We start with sec. 4211, laying down that taking possession under a purported conveyance in writing; anything of the dignity of color of title, claiming as an owner might claim, initiates adverse possession; the raising of the flag of the invader, if the instrument is anything constituting, by common understanding, as laid down in the books, color of title; anything that is a real semblance of paper conveyance, however defective the title in fact, may be. *McCann v. Welch, supra; Field v. Columbet,* 9 Fed. Cas. 12; *Bartlett v. Ambrose,* 78 Fed. 839, 843; *In re Ah Lee,* 5 Fed. 899, 913; *Latta v. Clifford,* 47 Fed. 614; *Aldrich v. Griffith,* 66 Vt. 390, 29 Atl. 376.

It was said in *McCann v. Welch, supra,* by Justice DODGE, speaking for the court:

"Wherever the Wisconsin doctrine is maintained, no paper writing, purporting upon its face to be executed and to convey the land, has been held insufficient to support a claim of title such as may ripen into complete ownership by possession for the statutory period. A deed void upon its face will suffice (*McMillan v. Wehle,* 55 Wis. 685, 13 N. W. 694; *Whittlesey v. Hoppenyan,* 72 Wis. 140, 39 N. W. 355); a deed executed by a married woman who has no power to convey (*Sanborn v. French,* 22 N. H. 246; *Perry v. Perry,* 99 N. C. 270, 6 S. E. 86); a deed ostensibly by an agent, possessing no authority (*Millen v. Stines,* 81 Ga. 655, 8 S. E. 315); or signed by one *non compos mentis* (*Ellington v. Ellington,* 103 N. C. 54, 9 S. E. 208); or by one having neither title nor possession (*Webber v. Clarke,* 74 Cal. 11, 15 Pac. 431; *Love's Lessee v. Shields,* 3 Yerg. 405); a deed secured by fraud of the grantee (*Oliver v. Pullman,* 24 Fed. 127). . . . The underlying idea of this statute is not reward to the diligent trespasser, but rather of penalty upon the negligent and dormant owner, who allows another for many years to ex-

ercise acts of possession over his property. The time necessary to render such occupancy effective under a deed is shortened, not in recognition of a good-faith claim by the occupant, but in recognition of the notice to the owner of the adversary character of that occupancy. . . . The purpose of the statute is not to benefit him who fraudulently obtains such a conveyance, but to deny the use of the courts to him who negligently sleeps on his rights. The requirement of good faith in few cases supporting it is in disregard or forgetfulness of the real purpose of statutes of adverse possession." 106 Wis. at pp. 147, 148 (81 N. W. 997, 998).

This entirely eliminates from our consideration the idea that adverse possession cannot be initiated without some claim of actual title grounded on facts which, whether known or not, would give rise reasonably thereto.

Having fixed the point of commencement, as aforesaid, in the light of the written law; that it is determinable solely thereby, and that the character of the instrument is the deciding factor (*Watts v. Owens,* 62 Wis. 512, 22 N. W. 720), we pass to the next point, fully and plainly covered as before by sec. 4215.

An adverse possession, commencing as indicated, and continuing without interruption for the full period of ten years, bars "an action for the recovery of such real estate so held adversely or of the possession thereof." Or, in other words, creates title in fact.

That is rounded out by the plain statute, sec. 4210, changing, radically, the common-law rule that, possession by one, not having title in fact, is presumed, unless shown, clearly and satisfactorily, to the contrary by evidence of the nature of the entry as well as of the continuation of the possession, to be in subordination to the legal title,—so that, in case of possession being in one, as it might be in the true owner, for the full statutory period, the presumption arises, that it commenced with all the statutory essentials of adverse entry and likewise continued, efficiently extinguishing the original title;

such presumption being, of course, one of fact and, as such, rebuttable, yet, of as much dignity in favor of the new apparent owner as the presumption displaced during its life was in favor of the former owner's title, in that it requires evidence to extinguish it of the same probative force as would be required to overturn the former.

That makes a complete code of written law, easily understood, and abrogates all rules inconsistent with it, and plainly the rule, so far as it ever existed in fact, that a conveyance by one having a permissive right, such as a tenant, does not furnish a legitimate basis for the incidents of adverse possession.

The significance of this statutory displacement of the common-law presumption, if not fully appreciated in the early days of our system of adverse possession, wholly governed by written law, has been fully vindicated in recent years, as will be seen by the decisions we have referred to, particularly *McCann v. Welch,* 106 Wis. 142, 81 N. W. 996; *Pitman v. Hill,* 117 Wis. 318, 323, 94 N. W. 40; *Wilkins v. Nicolai,* 99 Wis. 178, 74 N. W. 103; *Wollman v. Ruehle,* 100 Wis. 31, 35, 75 N. W. 425; *Ill. S. Co. v. Bilot,* 109 Wis. 418, 440, 84 N. W. 855, 85 N. W. 402.

So we find that the doctrine of title by right of conquest alone, provided for by statute at all points, harsh though it may seem, in an instance now and then, is, in general, grounded on sound public policy and is well established as a rule of property by our written and our unwritten law.

If one raises the flag of the invader, grounded on mere color of title, regardless of right or claim of right in fact, and keeps that flag flying without interruption, in view and defiance of all men, for the full period required, he thereby acquires all the right of a conqueror, who often obtains his right, so called, by force.

It is needless to refer at length to decisions elsewhere whether in or out of harmony with the foregoing, though the

incidental reference here made to the cause of want of harmony, so far as the same exists, might be easily demonstrated to a mathematical certainty. In jurisdictions where contrary holdings are claimed to exist, it may readily be seen how difficult courts have found it to maintain their position.

In *Bradt v. Church,* 110 N. Y. 537, 18 N. E. 357, the New York court charged the alleged adverse possessor with the characteristics of his grantor's right, in that it was that of a tenant, because he entered under a quitclaim deed from such tenant, though it was confessed he was ignorant, in fact, of such grantor's relation to the real owner. The turning point seems to have been the character of the conveyance as indicated. To that there is an able dissenting opinion by Mr. Justice EARL, in the course of which it is said:

"Can it be the law that when a lease has once been executed all persons thereafter found in the adverse possession of the land must be presumed to be in under the lease? There is absolutely no case holding or hinting at such a doctrine. It is not found in the cases of *Jackson v. Davis,* 5 Cow. 123, and *Jackson v. Harsen,* 7 Cow. 323. In each of those cases the party in possession claimed under or from the lessee."

There was no question in that case but that the persons claiming by the right of adverse possession based such right on a deed from a tenant of the true owner. That was supposed by the court to make him, necessarily, a claimant under the lessor, notwithstanding it appeared that he took, not as such, but as grantee, on the face of things, of the title. Justice EARL argued that actual taking as tenant was essential to connect the alleged adverse possessor with the tenant. Referring to the cited cases he said:

"In each of those cases the party in possession claimed under or from the lessee, and it was held that he took the position of the lessee, and could not, therefore, dispute the title of the landlord or set up adverse possession against him. But they are far from holding that the relation of landlord and tenant may be presumed without any proof, and thus what would otherwise be an adverse possession be defeated."

In *Townsend v. Boyd,* 217 Pa. St. 386, 66 Atl. 1099, to which we are referred, the doctrine here contended for by appellant was most distinctly repudiated. The court said:

"Where one enters without knowledge of the tenancy, and irrespective of it, in the assertion of a title on its face adverse to the lessor, though derived, as here, from the tenant, his possession will be hostile, if unequivocal acts and declarations manifest an intention to hold in despite of all others. . . . Of the facts that have been recognized as indicative of hostile intent, none are perhaps more decisive than the exhibition of a paper title, independent of that residing in the original owner, by color of which the party justifies his entry."

That language was based on the situation that the adverse possessor took possession under a deed and circumstances showing assertion of title of record.

That is to say the doctrine upon which counsel relies does not apply without specific proof that the hostile claimant took possession by virtue of the tenancy instead of in ignorance and repudiation of it.

It seems useless to pursue the matter further.

The opinion of the court is that the case is ruled by the letter of the statute in favor of the affirmative of the proposition presented, which we have fully discussed, and which, as we have seen, is the only one advanced by appellant to defeat the judgment deemed to be sufficient as to doubt and difficulty to warrant special treatment thereof.

By the Court.—Judgment affirmed.

The following opinion was filed February 23, 1909:

BARNES, J. (*dissenting*). The importance and the far-reaching effect of the rule of law declared in the opinion of the majority of the court impels me to express my views more at length than would ordinarily be excusable in a dissenting opinion. I think that opinion places a premium on piracy, not warranted by the statute, not sanctioned by the former

decisions of this court, and certainly not in harmony with the decisions of any other courts in this country, except those of Pennsylvania. The court holds that where a tenant in possession assumes to sell the property of his landlord, and thereupon, quietly and in accordance with his contract of sale, surrenders the possession which he holds by virtue of his tenancy to such purchaser, the latter, entering under his deed of conveyance, becomes an adverse occupant without any knowledge or notice to the landlord of his hostile claim. The decisions under sec. 4211, Stats. (1898), all hold that the entry under color of title and the possession held thereunder must be adverse to the true owner, else the statute will not run. Sec. 4211, construed in connection with the following section, requires the possession to be adverse.

1. The general rule of law that all persons claiming under a tenant and deriving their possession from him, however remotely, are precluded from relying upon their possession for the purpose of barring the title of the landlord, is one upon which there is little variance of authorities. The cases holding that the landlord may not be disseised by a tenant, or by one claiming possession under a tenant, are numerous, and are collected in 1 Am. & Eng. Ency. of Law (2d ed.) 811, and in 1 Cyc. 1062. The immediate question here is whether the general rule is applicable where a third party secures a conveyance, purporting to convey the fee, from the tenant in possession, believing him to be the owner of the land, and in good faith enters into possession by virtue of his deed from the tenant.

In *Emerick v. Tavener,* 9 Grat. 220, 58 Am. Dec. 217, the court held that, though a party purchase and enter upon premises under an absolute conveyance, "he still, in judgment of law, is deemed to have entered as the tenant of the landlord, and to hold the possession subject to all the duties and responsibilities pertaining to that character." The opinion in this case is cited with approval in the case of *Pulford v.*

Whicher, 76 Wis. 555, 45 N. W. 418, and is liberally quoted from therein. Among other parts of such opinion quoted in the *Pulford Case* is the following:

"When once this relation of landlord and tenant is established by the act of the parties, it attaches to all who may succeed to the possession through or under the tenant, whether immediately or remotely; the succeeding tenant being as much bound by the acts and admissions of his predecessor as if they were his own."

It can be fairly said that the doctrine of *Emerick v. Tavener* is approved in the *Pulford Case.* It can also be said, as is intimated in the opinion of the court in this case, that it was not necessary to a decision of the *Pulford Case* that the court should decide any question not immediately involved, and that the question there was whether, where there was fraudulent collusion between the tenant and the alleged adverse occupant, by reason of which possession was surrendered to the latter, his possession became adverse to the true owner or he became merely the tenant of such owner. The *Pulford Case* has at least the merit of involving the relation between the landowner and the successor to the possession held by the tenant, and the discussion, while taking a somewhat wider range than was essential, was not necessarily *obiter.* If that case cannot be considered as authority in the instant case, what should be said of the cases cited in the opinion in support of the proposition that the question here involved has been set at rest by former decisions? Not a single one of them involved the relation of landlord and tenant directly or remotely. General expressions are used to show the application of the statute to the facts in the case under consideration. Now these sweeping expressions are used to fit the facts in any case that may arise. It is said in the opinion here that if one raises the flag of the invader under color of title, and keeps it flying for the statutory period in defiance of all men, he acquires the right of a conqueror, or, in other words, becomes the owner of the property.

Thus an attempt is made to create law that must be unbendingly applied to all cases arising at all times and under all circumstances where color of title exists, where the flag of invasion is raised, and where the invader remains in possession of his conquest for ten years. The application of this rule, and it is stated just as broadly in a number of the cases, would prevent the court from giving any relief in case of possession being obtained by means of fraud and collusion with the tenant, provided the prescribed requisites existed. Such rule is directly contrary to the holding in the *Pulford Case*, although none of the decisions presume to overrule that case in any way. This illustrates the danger of always placing implicit reliance on rules of law without considering them in connection with the facts in the particular case, and the impropriety of sweeping away well-grounded exceptions by the application of general rules laid down in cases not involving the facts necessary to create the exception. The opinion of the court in this case states that the *Pulford Case* is not in point because there the possession of the adverse claimant was obtained by fraudulent collusion with the tenant. But neither sec. 4211 nor sec. 4212, Stats. (1898), recognizes in express terms any such exception, and the rule that is broadly laid down in this case recognizes none whatever. Sec. 4216, Stats. (1898), provides:

"Whenever the relation of landlord and tenant shall have existed between any persons the possession of the tenant shall be deemed the possession of the landlord until the expiration of ten years from the termination of the tenancy," in the case of a written lease.

The only material difference between our statute and that of New York is that in New York the occupancy must continue twenty years after the termination of the written lease before the possession of the tenant ceases to be that of the landlord, while in our state the prescribed period is ten years. Our statute is in fact borrowed from New York, although the New York law was modified in the manner suggested. The

decisions of the courts of that state in construing the statute should therefore not only be helpful, but should also be valuable as authority, particularly as secs. 4211 and 4212 of our statutes are taken from the New York Code, with some variations that are not material to the question under consideration.

In *Bedlow v. New York F. D. D. Co.* 112 N. Y. 263, 287, 19 N. E. 800, 811, the court said:

"Where the relation of landlord and tenant has been once established, the possession of the latter and that of his grantees and assignees is the possession of the landlord, and not hostile or adverse; and this is true even where the grantee has taken a deed of the fee in ignorance of the fact that his grantor stood in the relation of a tenant, the latter denying any such relation."

In *Church v. Schoonmaker,* 115 N. Y. 570, 571, 579, 22 N. E. 575, the defendant purchased land in good faith under warranty deed from a tenant in possession, believing him to be the owner, and it was held that until the statutory period of time had expired a purchaser under a warranty deed did not hold adversely to the landlord, and that his possession was that of a tenant to all intents and purposes.

In *Whiting v. Edmunds,* 94 N. Y. 309, 314, the court said:

"Where the relation of landlord and tenant has been once established, the possession of the latter and that of his grantees and assignees is the possession of the landlord, and not hostile or adverse; and this is true even where the grantee has taken a deed of the fee in ignorance of the fact that his grantor stood in the relation of a tenant."

There are numerous other New York cases holding likewise, among which might be cited *Jackson v. Davis,* 5 Cow. 123, 130; *Jackson v. Harsen,* 7 Cow. 323, 325; *Tompkins v. Snow,* 63 Barb. 525, 533; *Sands v. Hughes,* 53 N. Y. 287, 297; *Jackson v. Scissam,* 3 Johns. 499; *Bradt v. Church,* 110 N. Y. 537, 18 N. E. 357.

It is said that under sec. 4211 of our statutes as construed

by this court the entry of the adverse claimant need not be in good faith, while the contrary rule is held in New York under a similar statute, and that because of such variance in decisions the New York cases are wanting in weight as precedents. It is true that entry in good faith by one claiming under color of title is necessary to create adverse possession in New York, while this court has adopted the other rule. But this difference in views on that subject does not in any way affect the authority of the New York cases on the point under consideration. The question here is the character of the possession which the purchaser from the tenant receives, not the good or bad faith of the purchaser. The New York courts definitely hold that, no matter how innocent the purchaser may be, he still takes the possession of a tenant. In several of the cases it was admitted that such purchaser entered in good faith, thus satisfying the call of the statute defining adverse possession under color of title as construed in New York in this particular.

In *Phillips v. Rothwell,* 4 Bibb, 33, it was held that one who enters upon land as a tenant cannot controvert the title of his landlord, and if a tenant make a deed of bargain and sale to another in fee, the alienee would be in no better condition than the tenant and could not controvert the title by which the tenant entered.

In *Cooper v. Smith,* 8 Watts, 536, 539, 540, the court said:

"It is obvious that the title of a landlord to real estate, though perfectly good and indefeasible, would frequently be rendered the next thing to worthless, if his tenants, or third persons prevailing upon tenants to let them into possession, were permitted to call his title in question, and to make him show that it was better than any other to the land before they should be compelled to surrender the possession of it to him."

In *Harker v. Gustin,* 12 N. J. Law, 42, 48, it is held that where a third party enters into the possession of land with the consent of the tenant in possession, no matter how obtained, such person takes only the possession of the tenant

and holds in subordination to the landlord and not adversely to him. It is said the rule is otherwise where possession is taken without the permission or consent of the tenant.

In *Society, etc. v. Sharon,* 28 Vt. 603, 613, the court said:

"A tenant may repudiate his tenancy, and claim adverse in his own right against his landlord, and the statute will commence running against the landlord from the time he has notice of such repudiation of the tenancy."

The giving of a deed of the premises by the tenant in possession to a third party is held to be an unequivocal repudiation of the tenancy, but that the statute would not begin to run until the landlord had notice of the giving of such deed.

In *Swann v. Thayer,* 36 W. Va. 46, 14 S. E. 423, the court held that any instrument, however defective or imperfect, purporting to convey title of lands, which defines the extent of the claim under it, is color of title; that where a tenant accepts a deed from another, purporting to convey to him the land in fee, and later conveys it in fee to another, and both he and his alienee claim the land in their own right under such conveyance, *and the landlord has knowledge* of such conveyance and claim, possession by such tenant and his alienee *after such knowledge on the part of the landlord* for the period fixed by the statute of limitations will be adversary, and will bar the landlord's right. To the same effect is *Swann v. Young,* 36 W. Va. 57, 14 S. E. 426.

In *Campbell v. Shipley,* 41 Md. 81, 96, it is said:

"Not only is the tenant precluded from relying on his possession to bar his landlord, but also all persons who come in under, or derive possession from, the tenant in any manner, however remotely."

And in *Ehrman v. Mayer,* 57 Md. 612, 624, the following is added to the foregoing quotation:

"In such cases possession is presumed to be in accordance with the title, and this presumption will hold until some notorious and unequivocal act of exclusion shall have occurred."

Maryland, Vermont, and West Virginia all have statutes prescribing that title to real estate may be acquired by adverse occupancy. In so far as the question under consideration is involved, these statutes are not different in principle from our own. Other cases holding that third parties entering into the possession of leased premises with the consent of the lessee, however obtained, hold possession as tenants not adversely to the landlord, are *Graham v. Moore,* 4 Serg. & R. 467; *Turley v. Rodgers,* 1 A. K. Marsh. 245; *Russell v. Irwin's Adm'r,* 38 Ala. 44, 45, 50; *Saunders v. Annesly,* 2 Sch. & Lef. 73.

I have been unable to find any well-considered case, except *Dikeman v. Parrish,* 6 Pa. St. 210, approved in *Townsend v. Boyd,* 217 Pa. St. 386, 395, 66 Atl. 1099, which holds that the purchaser from a tenant in possession who succeeds to the possession of such tenant holds adversely to the landlord. The possession that is surrendered to him is the possession of the tenant. From the nature of the relation existing between the landlord and the tenant, that possession cannot be adverse during the continuance of the lease or for ten years thereafter; at least not without some repudiation of the relation of landlord and tenant by the party in possession, of which the landlord has notice. The question is exceedingly important and may often involve valuable property rights. If a tenant who is let into possession of property by the owner for a nominal consideration may the day following convey such property to a party who knows, or ought to know, that he has no title, and such grantee by entering into possession can at the end of ten years assert absolute title to the property, much fraud and injustice may be practiced. The question here presented simply is: Did the defendant enter into possession of the premises in dispute under color of title, or did he secure the possession of the lessee only? If the former is true, his possession is adverse. If the latter is true, his possession is simply the possession of the landlord. I think

under the authorities cited the defendant's possession in this case was not adverse, but was just as much the possession of the landlord as would have been Otto's possession had he remained in the occupancy of the premises. This construction of the law does no violence to the language of the statutes quoted. The situation of the defendant and his grantor in this case was such that no adverse possession could be given to the former by the tenant that was or could be adverse to the landlord until it was notified of the hostile claim, and until such notice was given the relation of landlord and tenant existed between the parties to this suit.

It was argued in the instant case that it does not fall within the general rule, however, because in this instance Otto was in possession of the premises at the time he leased the same from the North Chicago Rolling Mill Company. The California authorities certainly sustain this contention, and hold that under such circumstances a tenant in possession can show a paramount outstanding title either in himself or in a third party and thus defeat the action of ejectment. *Tewksbury v. Magraff,* 33 Cal. 237, 245; *Franklin v. Merida,* 35 Cal. 558, 571, 575; *Johnson v. Chely,* 43 Cal. 299, 305; *Peralta v. Ginochio,* 47 Cal. 459, 460. There are also numerous cases holding that, where a lease is obtained from a party in possession by fraud or misrepresentation, the party signing the same is not estopped from denying the landlord's title. That question, however, is not involved in this case. The rule of the California court is at variance with the decisions of most of the courts of this country, as will be seen from an examination of the following authorities: 18 Am. & Eng. Ency. of Law (2d ed.) 415; 24 Cyc. 938; *Killoren v. Murtaugh,* 64 N. H. 51, 5 Atl. 769; *School Dist. v. Long* (Pa.) 10 Atl. 769; *People's L. & B. Asso. v. Whitmore,* 75 Me. 117; *Wallace v. Ocean Grove C. M. Asso.* 148 Fed. 672, 78 C. C. A. 406; Jones, Landl. & T. § 697; *Jones v. Reilly,* 174 N. Y. 97, 66 N. E. 649; *Dixon v. Stewart,* 113 N. C. 410, 414, 18 S. E. 325; *Willis v. Harrell,* 118 Ga. 906, 45 S. E. 794;

Jordan v. Katz, 89 Va. 628, 16 S. E. 866; *Patterson v. Hansel,* 4 Bush, 654, 659; *Parrott v. Hungelburger,* 9 Mont. 526, 533, 24 Pac. 14; 1 Washb. Real Prop. (5th ed.) 599; *Campau v. Lafferty,* 43 Mich. 429, 5 N. W. 648; *Sage v. Halverson,* 72 Minn. 294, 295, 75 N. W. 229; *Ricketson v. Galligan,* 89 Wis. 394, 62 N. W. 87; *Lucas v. Brooks,* 18 Wall. 436; *Hughes v. Watt,* 28 Ark. 153; *Miller v. Bonsadon,* 9 Ala. 317; *Carter v. Marshall,* 72 Ill. 609; *Forgy v. Harvey,* 151 Ind. 507, 51 N. E. 1066; *Bowdish v. Dubuque,* 38 Iowa, 341; *Hawes v. Shaw,* 100 Mass. 187; *Williams v. Wait,* 2 S. Dak. 210, 49 N. W. 209; *Tyler v. Davis,* 61 Tex. 674. It follows that the defendant's grantor, Otto, recognized the title and possession of the lessor, and thereby estopped himself to dispute either, and that when once the relation of landlord and tenant was established between the plaintiff's grantor and said Otto, all persons succeeding to the possession through or under the lessee hold such possession as tenants of the lessor and not adversely to him.

2. The Otto lease was made July 1, 1887, for the period of five years. Either party might terminate it by giving the other six months' notice of intention so to do. It contained no prohibition against Otto's selling the interest he acquired thereunder, and provided that the annual rental of the parcel of land described therein should be $3 per annum, payable in advance. After the making of this lease the plaintiff had no immediate right of action against any one to recover the possession of the demised premises. The lease might be terminated, but only on six months' notice, and of course the lessor was under no obligation to give such notice. In the event of a default in payment of rent the landlord might oust the occupant, but this he was not obliged to do, and could not do without first giving notice to quit. As was said in *Mash v. Bloom,* 133 Wis. 646, 649, 114 N. W. 457, 459:

"There could have been no wrongful withholding of the premises until the plaintiff elected to take advantage of condition broken and so notified the defendant, either by demand

of possession or some other act equivalent to a re-entry for condition broken. Until this was done no right of action to recover possession of the premises existed."

The plaintiff in an action of ejectment must be entitled to the possession of the premises at the time the action is commenced. *M. E. Church v. N. P. R. Co.* 78 Wis. 131, 47 N. W. 190. The plaintiff was not entitled to the possession of the premises during the life of the lease, unless some condition thereof was broken and the lessor elected to take advantage of it, or unless the notice of termination provided for in the lease was given. The conveyance testified to as having been made from Otto to defendant, if it conveyed anything, carried Otto's possession, right of possession, and leasehold interest to the defendant, and would defeat any action brought by plaintiff to recover the property during the life of the lease, or until there had been a default in complying with its conditions and the same had been taken advantage of in the usual way. The landlord, not being entitled to the premises, could not bring ejectment until after the end of the term. *Johnson v. Gurley,* 52 Tex. 222; *Dennison v. Read,* 3 Dana, 586; *Fox v. Brissac,* 15 Cal. 223; *Van Rensselaer v. Jewett,* 2 N. Y. 141; Sedg. & W. Trial of Title, § 350, and cases cited.

3. The deed from Otto to *Budzisz* was not produced. The evidence tending to show its contents was so unsatisfactory that I feel disposed to say that it did not carry color of title. It was written by Mrs. Otto. Its contents were translated by her into German for one Kolp, who is the only witness sworn on the trial who assumes to remember what the document contained. According to his evidence the deed contained substantially the following:

"This property to *August Budzisz,* the ground, house, and all, and both signatures was below, he and she, Mrs. Otto. . . . Everything that is Frank Otto's to *August Budzisz.* . . . This house and the lot, the fence, and everything what was in the fence."

A deed may be sufficient to set the ten-year statute of limitations running where it is executed by one having neither title nor possession (*Webber v. Clarke,* 74 Cal. 11, 15 Pac. 431), or where it is void on its face (*Whittlesey v. Hoppenyan,* 72 Wis. 140, 39 N. W. 355), or by one who is *non compos mentis* (*Ellington v. Ellington,* 103 N. C. 54, 9 S. E. 208), or where it is secured by fraud of the grantee (*Oliver v. Pullam,* 24 Fed. 127), or where it is given by a married woman having no authority to convey (*Sanborn v. French,* 22 N. H. 246), or when given by an agent who has no authority to convey (*Millen v. Stines,* 81 Ga. 655, 8 S. E. 315). All these cases, as well as some others, are apparently cited with approval in *McCann v. Welch,* 106 Wis. 142, 147, 81 N. W. 996. But it is at least essential that a deed under which a party in possession of land claims color of title should describe the premises. *Graeven v. Dieves,* 68 Wis. 317, 31 N. W. 914; *Childs v. Nelson,* 69 Wis. 125, 33 N. W. 587; *McCann v. Welch, supra.* Where one "enters into and holds continual possession, under a paper title, of part of the premises included in it, he shall be deemed to hold adversely all of the premises included in it," except when the tract is divided into lots. *Pepper v. O'Dowd,* 39 Wis. 538, 543. It is therefore "essential to color of title that the premises shall be described with the same degree of certainty as is required in deeds relied upon as absolute conveyances." *Allmendinger v. McHie,* 189 Ill. 308, 311, 59 N. E. 517; *Shackleford v. Bailey,* 35 Ill. 387. "The calls of a deed, when title by adverse possession is claimed, limit the right as a matter of law," as to "the extent to which title can be claimed by adverse possession under the instrument itself." *Ill. S. Co. v. Budzisz,* 106 Wis. 499, 515, 81 N. W. 1027, 1033, 82 N. W. 534. If the plaintiff is to lose its title because of the execution and delivery of an instrument to the defendant conveying color of title, it would seem that it should be at least incumbent on the defendant to show that

the premises in controversy were in fact conveyed by such instrument.

"Statutes of this nature, which operate in restraint of the true title, or to make a certain kind of possession effectual for that purpose, if they are not to be construed strictly, yet ought not to be construed so liberally as to include within them any case not fairly within the words." *Sydnor v. Palmer,* 29 Wis. 226, 253.

This court, perhaps, has gone as far as any other in admitting parol testimony to clear up ambiguities in written instruments intended to convey an interest in lands. The law will not declare an agreement void, however uncertain, when light which contemporaneous facts and circumstances furnish renders the description definite and certain. A description which can be made certain by proof of an existing fact referred to in the agreement is regarded as sufficiently certain to enforce specific performance, and a deed of a description otherwise uncertain should be construed with reference to the actual rightful state of the property at the time of the execution of such deed. *Messer v. Oestreich,* 52 Wis. 684, 689, 10 N. W. 6; *Whitney v. Robinson,* 53 Wis. 309, 314, 10 N. W. 512; *Docter v. Hellberg,* 65 Wis. 415, 27 N. W. 176; *Simmons v. Johnson,* 14 Wis. 523, 526; *Mills v. C. & N. W. R. Co.* 103 Wis. 192, 79 N. W. 245; *Hanley v. Kraftczyk,* 119 Wis. 352, 96 N. W. 820. And it has been held that a description in a complaint in ejectment is sufficient, if, by the aid of a surveyor and a person knowing the monuments and boundaries therein mentioned, the land can be found. *Off v. Heinrichs,* 124 Wis. 440, 102 N. W. 904.

These authorities deal with the construction which should be placed on such instrument in controversies arising between the parties thereto or those in privity with them, and hardly reach the question here involved. A party in adverse possession for twenty years without color of title acquires title to land. By means of an instrument conveying the land, coupled with adverse possession, the necessary period of ad-

verse possession is reduced to ten years. It is the instrument under which colorable title is claimed which curtails the necessary length of the adverse holding. This court has not as yet decided that such time may be curtailed by an instrument which at best does not contain any description of the property unless it is aided in material particulars by extraneous facts resting solely within the knowledge of the parties to the transaction. If we concede that, if this were an action between the grantor and grantee in this instance, parol evidence would be admissible to remove the existing ambiguities which the testimony discloses, it by no means follows that such testimony should be received as against a third person who was an entire stranger to the deed, where such deed is relied upon as being an instrument conveying the land so as to set the ten-year statute of limitations running. According to the only parol testimony tending to establish the contents of this deed, the document must have read something like this: Frank Otto is selling his property, house, lot, ground, fence, and everything that is in the fence, that is Frank Otto's, to *Budzisz*—the document being signed by Frank Otto and Mary Otto. It goes without saying that this deed, standing alone, does not describe any real estate. It could only become effective as a conveyance when the description of the property is supplied by parol testimony. This description is the essential thing which I think should not rest in parol, but must be shown in the deed itself in order that the grantee may get the benefit of the ten-year statute.

4. I also think the court committed prejudicial and reversible error in not permitting plaintiff to cross-examine the defendant in reference to statements made by him which tended to show that he was not in fact in possession of the premises under his alleged color of title for the statutory period.

TIMLIN, J. I concur in the foregoing dissenting opinion of Mr. Justice BARNES.

A motion by the appellant for a rehearing was duly filed and submitted.

For the appellant there was a brief by *Van Dyke & Van Dyke, Walter D. Corrigan, John H. Paul,* and *Theodore Kronshage,* attorneys, and *Kronshage, McGovern, Goff, Fritz & Hannan,* of counsel. They contended, *inter alia,* that the doctrine that the possession of the tenant is and continues the possession of the landlord has existed for centuries. Litt. § 58; Coke, Litt. 47*b;* Bac. Abr. LEASES, 632; 6 Am. Law Rev. 1; 2 Plowd. *434; *Rawlyn's Case,* 4 Rep. 52*a,* 53*a; Sutton's Case,* Cro. Eliz. 140; *Driver ex dem. Oxenden v. Lawrence,* 2 W. Blackst. 1259; Cole, Ejectment, 213; *Doe ex dem. Bristow v. Pegge,* 1 T. R. 758; *Hall v. Butler,* 10 Ad. & El. 204; *Cooke v. Loxley,* 5 T. R. 4; *Cuthbertson v. Irving,* 4 H. & N. 742, aff'd 6 H. & N. 135; *Beckett v. Bradley,* 7 M. & G. 994; *Langford v. Selmes,* 3 K. & J. 220; *Delaney v. Fox,* 1 C. B. N. S. 166; *Jolly v. Arbuthnot,* 4 DeG. & J. 224; *Morton v. Woods,* 17 W. R. 414; *Cobb v. Arnold,* 8 Met. 398; *Barwick ex dem. Richmond v. Thompson,* 7 T. R. 488; *Blight's Lessee v. Rochester,* 7 Wheat. 535, 547. The estoppel rests upon considerations of public policy. Sedgwick & W. Trial of Title to Land, § 352; Kerr, Real Prop. sec. 1337; *Anderson v. Darby,* 1 Nott & McC. 369; 1 Greenl. Ev. § 25; *Cobb v. Arnold,* 8 Met. 398; Gear, Landl. & T. § 165, p. 580; *Crim v. Nelms,* 78 Ala. 604; *Caldwell v. Smith,* 77 Ala. 157; *Washington v. Conrad,* 2 Humph. 562, 565; *Griffin v. Ransdell,* 71 Ind. 440. No act of the tenant can prejudice title or possession of the owner. Chambers, Landl. & T. 38; 3 Washb. Real Prop. (5th ed.) 98; *Cameron v. C., M. & St. P. R. Co.* 60 Minn. 100, 103; *Saunders v. Annesley,* 2 Sch. & Lef. 73; *Prentise v. Hodgkin,* 2 Bulst. 138; *Luce v. Carley,* 24 Wend. 451. The estoppel continues until possession is surrendered to the landlord. Warvelle, Ejectment, § 459, p. 514; Cole, Ejectment, 216; *Doe ex dem. Knight v. Lady*

Smythe, 4 M. & S. 347; *Quinn v. Quinn,* 27 Wis. 168, 170; *Pulford v. Whicher,* 76 Wis. 555, 559; 2 McAdam, Landl. & T. sec. 421; 1 id. sec. 73, p. 219; *Tilghman v. Little,* 13 Ill. 239, 240; *Sharpe v. Kelley,* 5 Denio, 431; *McConnell v. Bowdry's Heirs,* 4 T. B. Mon. 392; *Jackson ex dem. Colton v. Harper,* 5 Wend. 246; 1 Washb. Real Prop. book 1, 159, sec. 4; *Bryan v. Winburn,* 43 Ark. 28; *Rogers v. Boynton,* 57 Ala. 501; *Wilson v. James,* 79 N. C. 349; *Bradt v. Church,* 39 Hun, 262, 264; *Williams v. Garrison,* 29 Ga. 503; *Dasher v. Ellis,* 102 Ga. 830; *Hodges v. Shields,* 18 B. Mon. 828; *Campbell v. Campbell,* 21 Mich. 438. The principle of estoppel is of general application whenever possession has been taken under any species of tenancy, whether the action be assumpsit, debt, covenant, or ejectment. Taylor, Landl. & T. § 705; Sedgwick & W. Trial of Title to Land, § 351; Hilliard, Real Prop. sec. 60, p. 394. This principle of estoppel applies in every form of action by which the lessor may seek to assert the rights reserved or promised to him in his lease. *Hilbourn v. Fogg,* 99 Mass. 11; *Miller v. Lang,* 99 Mass. 13; *Coburn v. Palmer,* 8 Cush. 124; *Towne v. Butterfield,* 97 Mass. 105; *Binney v. Chapman,* 5 Pick. 124; *Zeller's Lessee v. Eckert,* 4 How. 289, 295; *Vernam v. Smith,* 15 N. Y. 327, 329; *Strain v. Gardner,* 61 Wis. 174, 182. The following are instances where this doctrine of estoppel has been applied otherwise than in actions for ejectment: *Actions for use and occupation: Murphy v. Teter,* 56 Ind. 545; *Earle's Adm'r v. Hale's Adm'r,* 31 Ark. 470; *Cobb v. Arnold,* 8 Met. 398; *Binney v. Chapman,* 5 Pick. 124; *Codman v. Jenkins,* 14 Mass. 93; *Osgood v. Dewey,* 13 Johns. 240; *Moore v. Beasley,* 3 Ohio, 294; *Fronty v. Wood,* 2 Hill (S. C.) 367; *Dorrill v. Stephens,* 4 McCord, 59; *Cuthbertson v. Irving,* 6 H. & N. 135; *Balls v. Westwood,* 2 Campb. 11; *Rennie v. Robinson,* 7 Moore, 539; *Dolby v. Iles,* 11 Ad. & El. 335. *Actions for rent:* 24 Cyc. 942, note 91; *Lainson v. Tremere,*

1 Ad. & El. 792; *Johnson v. Tucker,* 136 Wis. 505, 117 N. W. 1003; *Lataillade v. Santa Barbara G. Co.* 58 Cal. 4; *Hill v. Williams,* 41 S. C. 134; *Life v. Secrest,* 1 Ind. 512; *Perkins v. Governor,* Minor, 352; *Parker v. Manning,* 7 T. R. 537; *Wittman v. M., L. S. & W. R. Co.* 51 Wis. 89; *Tondro v. Cushman,* 5 Wis. 279. *Unlawful detainer:* 24 Cyc. 942, n. 97–99; *Davis v. Pou,* 108 Ala. 443, 19 South. 263; *Nicrosi v. Phillipi,* 91 Ala. 299, 8 South. 561; *Thorn v. Reed,* 1 Ark. 480; *McLean v. Spratt,* 20 Fla. 515; *Thomas v. Sass,* 3 Ind. Terr. 545, 64 S. W. 531; *Sass v. Thomas,* 3 Ind. Terr. 536, 64 S. W. 528; *Settle v. Henson,* Morr. 111; *Mefford v. Franklin Co.* 22 Ky. Law Rep. 833, 58 S. W. 993; *Wilson v. Lyons,* 4 Neb. (Unofficial) 406, 94 N. W. 636; *Camley v. Stanfield,* 10 Tex. 546, 60 Am. Dec. 219; *Emerick v. Tavener,* 9 Gratt. 220, 58 Am. Dec. 217; *Stover v. Davis,* 57 W. Va. 196, 49 S. E. 1023; *First Eng. E. L. Church v. Arkle,* 49 W. Va. 92, 38 S. E. 486; *Voss v. King,* 33 W. Va. 236, 10 S. E. 402; *S. C.* 38 W. Va. 607, 18 S. E. 762; 32 Cent. Dig. sec. 159. *Summary proceedings:* 23 Cyc. 942; *Dilks v. Kelsey* (N. J. Law) 59 Atl. 897; *People ex rel. Murphy v. Lockwood,* 3 Hun, 304; *People ex rel. Ward v. Kelsey,* 38 Barb. 269; *White v. Bailey,* 14 Conn. 271. *Replevin: Syllivan v. Stradling,* 2 Wils. 208; *Dancer v. Hastings,* 4 Bing. 2; *Hall v. Butler,* 10 Ad. & El. 204. *Suits for equitable relief: Homan v. Moore,* 4 Price, 5; *Pulford v. Whicher,* 76 Wis. 555; *Shepardson v. Elmore,* 19 Wis. 424. *Actions relating to personal property: Hall v. Butler,* 10 Ad. & El. 204; *Neubauer v. Gabriel,* 86 Wis. 200. *Waste: Cole v. Bickelhaupt,* 64 App. Div. 6; *Dills v. Hampton,* 92 N. C. 565; Everest & S. Estoppel, 291. *Cases between bailor and bailee: Biddle v. Bond,* 6 B. & S. 225; *Shelbury v. Scotsford,* Yelv. 23; *Wilson v. Anderton,* 1 B. & Ad. 450; *Rogers v. Lambert,* [1891] 1 Q. B. 318; *Henderson v. Williams,* [1895] 1 Q. B. 521, 534. *Cases between licensor and licensee: Hayne v. Maltby,* 3 T. R. 438; *Hall v. Conder,* 2 C.

B. N. S. 22; *Lawes v. Purser,* 6 E. & B. 930; *Taylor v. Hare,* 1 B. & P. N. R. 260; *Noton v. Brooks,* 7 H. & N. 499; *Crossley v. Dixon,* 10 H. L. Cas. 293; *Clark v. Adie,* L. R. 2 App. Cas. 423, 435; *Cameron v. C., M. & St. P. R. Co.* 60 Minn. 100, 103; *Doe ex dem. Johnson v. Baytup,* 3 Ad. & El. 188; *Ryder v. Mansell,* 16 Am. L. Reg. 590. The estoppel to dispute title and possession runs with the land. Taylor, Landl. & T. § 91; Sims, Covenants, 126; 1 McAdam, Landl. & T. 219; *Webb v. Austin,* 7 M. & G. 701; *Weale v. Lower,* Pol. 54 (Co. Litt. 352*a*); Bac. Abr. LEASE, O; *Trevivan v. Lawrence,* 6 Mod. 256, 258, 2 Ld. Raym. 1048*a, c,* 1 Salk. 276; *Goodtitle ex dem. Faulkner v. Morse,* 3 T. R. 365, 371; Redman & Lyon, Landl. & T. 25; *Doe ex dem. Downe v. Thompson,* 9 Q. B. 1043; *Barwick ex dem. Richmond v. Thompson,* 7 T. R. 488; *London & N. W. R. Co. v. West,* L. R. 2 C. P. 553, 36 L. J. C. P. 245. Estoppel extends to all succeeding to possession from, through, or under the tenant. Tyler, Eject. & Adv. Enj. 208; Kerr, Real Prop. sec. 1339; Gear, Landl. & T. sec. 165; Cole, Ejectment, 214; Newell, Ejectment, 595; Warvelle, Ejectment, sec. 462; Everest & S. Estoppel, 269; Buswell, Limitations, § 308; Williams & Yates, Ejectment, 28, 29; *Taylor v. Needham,* 2 Taunt. 278, 282; *Goodtitle ex dem. Faulkner v. Morse,* 3 T. R. 365, 371; *Doe ex dem. Bullen v. Mills,* 2 Ad. & El. 17; *Sexton v. Carley,* 147 Ill. 269; *Hardin v. Forsythe,* 99 Ill. 312, 320; *Worthington v. Lee,* 61 Md. 530, 539; *Cameron v. C., M. & St. P. R. Co.* 60 Minn. 100, 103; *Elms v. Randall,* 4 Dana, 519; *Doe ex dem. Callender v. Sherman,* 5 Ired. 711; *Doe ex dem. Belfour's Heirs v. Davis,* 4 Dev. & B. 300; *Jackson ex dem. Williams v. Miller,* 6 Wend. 228; *Coles v. Marquand,* 2 Hill, 447; *Bertram v. Cook,* 32 Mich. 518; *Doe ex dem. Lockwood v. Walker,* 3 McLean, 431; *Neff v. Ryman,* 100 Va. 521, 522; *Stewart v. Keener,* 131 N. C. 486, 487; *Hackney v. McIninch,* 79 Neb. 128, 112 N. W. 296; *White v. Barlow,* 72 Ga. 887; *Graham v. Moore,* 4 Serg. & R. 467, 472; *Den*

ex dem. Lunsford v. Alexander, 4 Dev. & B. 40; *Conwell v. Mann,* 100 N. C. 234; *Thorndike v. Norris,* 24 N. H. 454; *Milhouse v. Patrick,* 6 Rich. Law, 350; *Washington v. Conrad,* 2 Humph. 562; *Allen v. Paul,* 24 Grat. 332; *Allen v. Bartlett,* 20 W. Va. 46; *Genin v. Ingersoll,* 2 W. Va. 558; *Stagg v. Eureka T. & C. Co.* 56 Mo. 317; *Derrick v. Luddy,* 64 Vt. 462; *Jamaica v. Hart,* 52 Vt. 549; *Territt v. Cowenhoven,* 79 N. Y. 400; *Richardson v. Harvey,* 37 Ga. 224; *Doe ex dem. Kluge v. Lachenour,* 34 N. C. 180; *Thomson v. Peake,* 7 Rich. Law, 353; *Sexton v. Chicago S. Co.* 129 Ill. 318. The estoppel applies even if grantee of fee is ignorant of the tenancy. Jones, Landl. & T. § 699; *McLennan v. Grant,* 8 Wash. 603; *Reed v. Shepley,* 6 Vt. 602, 603; *Phillips v. Rothwell,* 4 Bibb, 33; *Fusselman v. Worthington,* 14 Ill. 135; *Campbell v. Shipley,* 41 Md. 81, 96; *Rose v. Davis,* 11 Cal. 133, 135; *Lane's Lessee v. Osment,* 9 Yerg. 86; *Newman v. Mackin,* 21 Miss. 383. The successor of the tenant, being in privity with his predecessor, is also estopped. *Taylor v. Needham,* 2 Taunt. 278, 282; *McLennan v. Grant,* 8 Wash. 603; *Sexton v. Chicago S. Co.* 129 Ill. 318; *Hackney v. McIninch,* 79 Neb. 128, 112 N. W. 296; *Buford v. Wasson* (Tex.) 109 S. W. 275; *Carter v. La Grange,* 60 Tex. 636; *Cobb v. Robertson,* 99 Tex. 138, 86 S. W. 746; Cole, Ejectment, 215; 1 Washb. Real Prop. (5th ed.) 430; 2 Kerr, Real Prop. secs. 1339, 1340; 1 Hilliard, Real Prop. (4th ed.) 293, § 60; 2 Greenl. Ev. § 305; Angell, Limitations, sec. 442; Townshend, Recovery of Demised Premises, 34; 1 Wood, Landl. & T. 16, 17; Gear, Landl. & T. §§ 4, 166; *Worthington v. Lee,* 61 Md. 530, 539; *Jackson ex dem. Van Schaick v. Davis,* 5 Cow. 123; 1 McAdam, Landl. & T. 78; *Jackson v. Mowry,* 30 Ga. 143; *Phelps v. Conant,* 30 Vt. 277; *Littleton v. Wynn,* 31 Ga. 583; *Oakes v. Oakes,* 16 Ill. 106; *Chambers v. Ross,* 25 N. J. Law, 293; *Jacques v. Short,* 20 Barb. 269; *Provost v. Calder,* 2 Wend. 517; *Armstrong v. Wheeler,* 9 Cow. 88; *Acker v. Witherell,* 4 Hill (N. Y.) 112;

Benson v. Bolles, 8 Wend. 175; *Overman v. Sanborn,* 27 Vt. 54; *Howland v. Coffin,* 12 Pick. 125; *Taylor ex dem. Atkyns v. Horde,* 1 Burr. 60, 112; *Howard v. Ellis,* 4 Sandf. 369; *Jackson ex dem. Webber v. Harsen,* 7 Cow. 323, 325; *Towery v. Henderson,* 60 Tex. 291, 296; *Jackson ex dem. Klein v. Graham,* 3 Caines, 188; *Jackson ex dem. Masten v. Bush,* 10 Johns. 223; *Mitchell v. Life,* 8 Yerg. 179; *Willison v. Watkins,* 3 Pet. 43; *Wittman v. M., L. S. & W. R. Co.* 51 Wis. 89; *Boynton v. Jackway,* 10 Paige, 307; *Wood v. Turner,* 8 Humph. 685, 689; *Wood v. Turner,* 7 Humph. 517; *Siglar v. Malone,* 3 Humph. 16; *Thomson v. Peake,* 7 Rich. Law, 353; *Murphy v. Teter,* 56 Ind. 545; *Granger v. Parker,* 137 Mass. 228; *Hentig v. Pipher,* 58 Kan. 788; *Walker v. McCusker,* 71 Cal. 594. The relation of landlord and tenant is not dependent upon the payment of rent. *Failing v. Schenck,* 3 Hill (N. Y.) 344, 346; *Orrell v. Maddox,* Runnington, Ejectment, 458, App. 1; 2 Hilliard, Abr. Real Prop. 191; *Bradt v. Church,* 110 N. Y. 537, 544; *Jackson ex dem. Van Schaick v. Davis,* 5 Cow. 123, 129, 132; *Lyon v. Odell,* 65 N. Y. 28; *Jackson ex dem. Kane v. Sternbergh,* 1 Johns. Cas. 153; *Russell v. Doty,* 4 Cow. 576; *Jackson ex dem. Klein v. Graham,* 3 Caines, 188; *Hasbrouck v. Burhans,* 42 Hun, 376; *Strain v. Gardner,* 61 Wis. 174, 182; *McCormick v. Herndon,* 86 Wis. 449. The New York doctrine is that the grantee in fee under deed from a tenant is estopped to claim adversely, notwithstanding his ignorance of the tenancy. *Jackson ex dem. Vandeuzen v. Scissam,* 3 Johns. 499; *Jackson ex dem. Swartwout v. Cole,* 4 Cow. 587; *Jackson ex dem. Webber v. Harsen,* 7 Cow. 323; *Luce v. Carley,* 24 Wend. 451; *Jacques v. Short,* 20 Barb. 269; McAdam, Landl. & T. 219; Bac. Abr. LEASES (ed. 1832) 853; 2 Kerr, Real Prop. sec. 1342; 1 Coke, Litt. (19th ed.) 47*b;* Taylor, Landl. & T. §§ 89–91; Cooley's Blackst. bk. II, 144, note; Jones, Landl. & T. § 688; 3 Washb. Real Prop. 98; Williams & Yates, Ejectment, 28, 29; Sedgwick & W. Trial of Title

to Land, 254; Cole, Ejectment, 215, 216; 24 Cyc. 937. The statute in New York was and is that, where the relation of landlord and tenant exists, the possession of the tenant is deemed to be the possession of the landlord until twenty years after the expiration of the tenancy. Sec. 13, tit. II, art. I, R. S. N. Y. 1829; *O'Donnell v. McIntyre,* 118 N. Y. 156; *Sands v. Hughes,* 53 N. Y. 287, 293; *Whiting v. Edmunds,* 94 N. Y. 309; *Bradt v. Church,* 110 N. Y. 537, 543; *Bedlow v. New York F. D. D. Co.* 122 N. Y. 263, 287; *Church v. Schoonmaker,* 115 N. Y. 570, 571; *Tompkins v. Snow,* 63 Barb. 525; *Merritt v. Smith,* 27 Misc. 366, 369. The New York statute was embodied literally into the territorial statutes of 1839, and has continued unchanged to the present time, except that in 1858 the life of the estoppel was cut down from twenty to ten years. *Pulford v. Whicher,* 76 Wis. 555; *Tondro v. Cushman,* 5 Wis. 279; *Shepardson v. Elmore,* 19 Wis. 424; *Chase v. Dearborn,* 21 Wis. 57; *Quinn v. Quinn,* 27 Wis. 168, 170; *Cross v. Upson,* 17 Wis. 618, 623; *McPherson v. Featherstone,* 37 Wis. 632, 643; Angell, Limitations, 385; 3 Washb. Real Prop. 123–127; *Wittman v. M., L. S. & W. R. Co.* 51 Wis. 89; *De Pere Co. v. Reynen,* 65 Wis. 271, 281; *Neubauer v. Gabriel,* 86 Wis. 200, 204; 26 Am. & Eng. Ency. of Law (2d ed.) 602; *Clark v. Janesville,* 10 Wis. 136; *Wis. Ind. School v. Clark Co.* 103 Wis. 651; *Richardson v. Stuesser,* 125 Wis. 66; *Meek v. Pierce,* 19 Wis. 300; *Orton v. Noonan,* 29 Wis. 541, 545; *Heydon's Case,* 3 Rep. 18; *U. S. v. Fisher,* 2 Cranch, 358; *Wales v. Lyon,* 2 Mich. 276, 285.

Fiebing & Killilea, attorneys, and *Moritz Wittig* and *H. J. Killilea,* of counsel, *contra.*

The following opinion was filed May 11, 1909:

MARSHALL, J. Notwithstanding the very able and exhaustive argument for a rehearing filed by appellant's attorneys, after a careful review thereof it is the opinion of the

court that the principles of law already stated have been, in terms or effect, many times declared and applied here in recent years and that, logically, they rule this case as indicated in the former opinion.

The difficulty with counsel's argument is that it is based on a multitude of authorities, ancient and modern, largely the former, which, with numerous others that might be referred to, constitute about as hopeless a state of confusion, especially when differing statutory regulations are not taken account of, respecting the law of adverse possession as could well be. That was appreciated by our early workers in the field of constructive legislation, and for the purpose of making a plain, workable, just code of written law to be referred to as a certain test of rights and remedies relative to titles to realty, our statutes, as we now find them, were adopted more than half a century ago and have been, as a rule, closely adhered to. Such being the case, what a waste of time, energy, and public and private expense it is to pin one's faith to the very confused state of things such statutes were designed to supersede and endeavor to engraft some part of the displaced old system upon the new one.

There are numberless cases and many text-books declaring that no lessee or person claiming under him can impeach the right or title of the lessor, which is all right as a general proposition. But whether the term "claiming under him" is to be considered in the sense of claiming under him as sublessee only, or that and claiming as owner as well, and if the latter, whether it includes a claimant, as owner, without notice or reasonable means of notice of the limited right of the intermediate possessor, and means that a person in possession as lessee cannot, under any circumstances, without prior restitution, turn permissive into adverse possession and that his grantee of the property, in form in fee, cannot do it, whether he takes with notice of the actual state of the title or without such notice or negligence in the matter,—whether

these and many other questions that might be mentioned, such as whether the basic principle involved is grounded on legal or on equitable estoppel and whether the presumption that the possession of the one who takes as tenant is, till restitution occurs, presumed to be the possession of the landlord—subservient to his right, instead of adverse thereto; and if conclusive, generally, but not universally, what are the exceptions; and whether a person to initiate adverse possession under color of title must act in good faith, and, if so, whether the rule of good faith requires more than a *bona fide* intention to claim the property as owner regardless of the rights of others, or whether it requires an honest reasonable belief that the claim of title is rightful; and whether mere claim as owner under color of title, though with knowledge of invalidity of the claim, is sufficient; and if that be so, whether that rule is universal, extending to possessions obtained by fraud, and many other situations,—are involved in more or less confusion in judicial and text-book authorities.

Can it be wondered at that our lawgivers made an effort to rescue the law which had fallen into such distressing confusion, by the actions of courts and treatment of commentators, and differing statutory regulations, by condemning the system to oblivion and erecting in its stead a simple code of written laws? They having attempted to do that, as all must admit they did, how unfortunate it would be if the persistence of counsel, from time to time, in holding up to view some part of the displaced system with a great array of authorities, many of which have no application by reason of statutory bases, as governing some particular supposed distressing situation, were permitted to prevail, either by reason of mistaken notion that our statutes are not exclusive and to be enforced just as we find them, but are merely supplementary to old principles and to be administered so as to harmonize with adjudications elsewhere—following common-law rules, or statutes differing from ours, or similar statutes which have

failed to accomplish that degree of certainty in the law intended, through want of loyalty of courts to the people's will in administering them, or some notion that the limitation statutes instead of being regarded as wise beneficial instrumentalities of peace may be legitimately viewed in an unfavorable light and bent out of the sphere of their letter to fit some supposed equity,—should prevail. The result would soon be that, notwithstanding the few plain written rules, no one however learned in the law could tell with any reasonable degree of certainty the right of any given situation in advance of a final adjudication. Up to this time there have been but very few and very slight judicial lapses from the statutory line, and such as there have been were speedily rectified.

The principle of the doctrine that neither a tenant nor a person claiming under him can set up adverse possession against the landlord, applies to a mortgagor and mortgagee, vendor and vendee under a land contract, and others where the possession of one is obtained under an obligation to return it to its source. But all these situations are covered by the letter of the statute that, "where the occupant or those under whom he claims entered into the possession of any premises under claim of title, exclusive of any other right, founding such claim upon some written instrument, as being a conveyance of the premises in question, . . . and that there has been a continued occupation and possession of the premises included in such instrument . . . or some part of such premises under such claim for ten years, the premises so claimed shall be deemed to have been held adversely," etc. No element of good faith is required because that element in the former law was omitted. The elimination of that, eliminated the basic feature—the foundation of the equitable estoppel, which is the key to the principle for which counsel contend and which is without force any way and has been abandoned in many jurisdictions, as we shall see, where the grantee from

the tenant takes without notice of the limitations of the latter's right and holds adversely and notoriously for the statutory period.

The doctrine of tacking, which cut so important a figure in the early litigation in these *Illinois Steel Company* cases—the doctrine that any kind of a conveyance, so long as it purports to convey title absolutely, satisfies the rule for color of title; the doctrine that good faith or bad faith in taking or holding possession is immaterial, it being understood that all supposed features of the law as it existed at the origin of the statute not found therein are regarded as abrogated; the doctrine that actual possession of part draws to it possession of the balance, within the calls of the deed, and the doctrine that actual, continuous, notorious, hostile possession for the statutory period supersedes the presumption of possession in the holder of the legal title and creates a presumption of hostile possession with all the essentials of title by conquest, as embodied in the quoted language and that of associate sections,—is as plain as English words can make it. All that which is embodied in the statute is the law and a rule of property. All not there, and which is in conflict therewith, is not the law. All efforts to engraft upon the statutes exceptions not made by statute, and all efforts to dignify authorities elsewhere, inconsistent with our system, must fail notwithstanding the particularity of any particular situation. Importance of adhering strictly to our statutes and the logic of our decisions will appear by the following:

Counsel refer to Newell on Ejectment at page 602, to the effect that a tenant is estopped from denying his landlord's title and that the former's assignee is likewise estopped, which, as said before, is all right as a general rule, but it is highly misleading if taken literally as to all situations and as a legal estoppel. The author cites *O'Brien v. Wetherell,* 14 Kan. 616, and *Raley v. Ross,* 59 Ga. 862. The first case is to the effect that where title is conveyed to a person upon con-

dition subsequent expressed in the deed, and such person conveys to another, the latter will take subject to such condition. The second case is to the effect that if a person in possession of land under a land contract dies, his successor is estopped from questioning the title of the executory vendor the same as his predecessor was. Thus it will be seen the general principle from which the author framed his text is that if one claims land as a mere successor in title of another who is under contract to, unconditionally, or contingently, restore possession to a third person from whom it came, whether the succession be that of heir or sublessee, his relation to such third person will be the same as that of his predecessor, and with that we make no question, but it must be viewed in the light of and subservient to other principles and statutes.

Counsel also refer to Jones on Landlord & Tenant to the effect that "the estoppel which binds a tenant against denying the title of his landlord is equally binding on one to whom the tenant has conveyed the premises in fee." Sec. 699. True, till the relation has been superseded by lapse of the period of adverse possession. The text is not inconsistent with the idea that if a person takes from a tenant a fee, in form, and takes possession as owner, notoriously in hostility to the true owner, he thereby initiates adverse possession. The author cites *Emerick v. Tavener,* 9 Grat. 220. The case is grounded on ancient authorities while recognizing the claim that the estoppel rests on a rebuttable presumption which is displaced by proof of taking possession as owner under a deed from the tenant purporting to convey a fee and circumstances characterizing the same operating as a disseisin. The idea that there is a legal estoppel in such cases instead of a mere rebuttable presumption has been repudiated in many cases, especially in recent years. We refer to the following: *Dikeman v. Parrish,* 6 Pa. St. 210, 225; *Townsend v. Boyd,* 217 Pa. St. 386, 395, 66 Atl. 1099; *McDougald v. Reedy,* 71 Ga. 750; *Sherman v. Champlain T. Co.* 31 Vt. 162, 177; *Bradt*

v. Church, 110 N. Y. 537, 18 N. E. 357; *Sands v. Hughes,* 53 N. Y. 287; *Whiting v. Edmunds,* 94 N. Y. 309; *Bedlow v. New York F. D. D. Co.* 112 N. Y. 263, 288, 19 N. E. 800; *Bradstreet v. Huntington,* 5 Pet. 402, 439, 440.

Counsel further refer to the text in Jones on Landlord & Tenant, to the effect that possession under a deed from a tenant purporting to convey the fee does not displace the estoppel in favor of the landlord even if the grantee takes possession without knowledge of the former's right. The text is based on the early cases of *Reed v. Shepley,* 6 Vt. 602, and *Greeno v. Munson,* 9 Vt. 37. Referring to such cases we find they are in conflict with numerous other and more modern cases we have cited and are not based on any statute and do not recognize any modification of the ancient doctrine repudiated in *Bradstreet v. Huntington, supra,* and other cases, and that they were practically overruled by *Sherman v. Champlain T. Co., supra,* opinion by REDFIELD, C. J., where it is said that the tenant by notice that he no longer holds under the landlord commits a disseisin, turning the permissive to an adverse possession, which if continued for the statutory period will ripen into a title in the possessor's own right, referring to the federal doctrine announced in *Willison v. Watkins,* 3 Pet. 43, 48, and recognizing that "it is undoubtedly a new doctrine, and adopted here from a regard to the difference in our land tenures, and in our civil and social relations and institutions in many respects, from those in England."

Referring to the cited cases and others it will be seen that unequivocal disapproval of the tenancy relation, such as deeding the property as owner to another who notoriously takes possession and claims as owner, is all the notice required.

We might go on, step by step, through all of counsel's citations with the same result as indicated thus far. All the numerous cases we have cited repudiate or explain and modify the ancient doctrine, sanctioned by many authorities, cited to our attention, that the possession of a tenant cannot be turned into an adverse possession either in himself or his suc-

cessor or grantee till possession has first been actually substantially restored to the landlord.

In *Bradstreet v. Huntington,* 5 Pet. 402, 439, the federal supreme court, reaffirming a statement in *Society, etc. v. Pawlet,* 4 Pet. 480, said:

"A possession may be adverse, wherever an ouster may be presumed. . . . It may be adverse, and maintain a bar under the statute, even where ouster is in terms repelled, and not to be presumed from the very circumstances of the case. The words of the court are: 'A vendee in fee derives his title from the vendor; but his title, though derivative, is adverse to that of the vendor. He enters and holds possession for himself, and not for the vendor. Such was the doctrine of this court in *Blight's Lessee v. Rochester,* 7 Wheat. 535.' If this be the correct doctrine of this court, and there can be no doubt it is, it seems to follow that wherever the proof is, that one in possession holds for himself, to the exclusion of all others, the possession so held must be adverse to all others, whatever relation in point of interest or privity he may stand in to others. Such certainly is the view taken of the law in the reasoning of this court in the case of *Willison v. Watkins,* 3 Pet. 43, 53, and with express reference to lessors, mortgagors, trustees, and tenants in common."

We recognize that some of the authorities are to the effect that neither a tenant nor any one claiming under him can initiate adverse possession without at least doing something equivalent to a surrender of possession, as by an unqualified denial of the right of the landlord and bringing home to him knowledge of the adverse claim—giving actual efficient notice of it,—but that is repudiated or explained in other jurisdictions, it being held sufficient if the facts are such as to indicate, circumstantially, with reasonable clearness to the true owner that his right is denied and that the person in possession claims as owner. This, or its equivalent, is found in many cases:

Where one enters as owner "without knowledge of the tenancy" asserting "title on its face adverse to the lessor, though derived from the tenant, his possession will be hostile, if un-

equivocal acts and declarations manifest an intention to hold in spite of all others. *Nor is it necessary, in order to engraft the element of exclusiveness and hostility upon such possession, a party should expressly declare intention thus to hold.*" *Dikeman v. Parrish,* 6 Pa. St. 210, 225.

That is the doctrine of this court plainly declared in *Stevens v. Brooks,* 24 Wis. 326, as will be seen later.

The idea indulged in that there is something particularly sacred in the relation of landlord and tenant, and that a tenant or person claiming under him by deed, who actually and notoriously asserts title in himself, is not entitled to the same protection as any other adverse possessor, in case the true owner sleeps upon his rights for the full statutory period, was repudiated by the supreme court of the United States in the leading case of *Willison v. Watkins,* 3 Pet. 43, 53, this language being used:

"The relations created by a lease are not more sacred than those of a trust or mortgage. . . . If he suffers the tenant to retain possession twenty years after a tenancy is disavowed, and cannot account for his delay in bringing his suit, why should he be exempted from the operation of the statute more than the mortgagor or the mortgagee? We can perceive no good reasons for allowing this peculiar and exclusive privilege to a lessor. . . . In the case in 1 Nott & McC. 374 [*Wilson ads. Weatherby*], the court decide that, where a defendant enters under a plaintiff, he shall not dispute his title while he remains in possession, and that he must first give up his possession, and bring his suit to try titles. To the correctness of this principle we yield our assent, not as one professing to be peculiar to South Carolina, but as a rule of the common law applicable to the cases of fiduciary possession before noticed. It is laid down as a general rule, embracing in terms tenants in common, trustees, mortgagees, and lessees, but disallowing none of the exceptions or limitations which qualify it and exclude from its operation all cases where the possession has become adverse, where the party entitled to it does not enter or sue within the time of the statute of limitations, or give any good reason for his delay; leaving the rule in full

force wherever the suit is brought within the time prescribed by law. To this extent, and this only, the decision would reach. . . . In relation to the limitation of actions for the recovery of real property, we think . . . that the statute ought to receive such a construction as will effectuate the beneficent objects which it is intended to accomplish—the security of titles and the quieting of possessions."

Thus it will be seen full effect was given to the common-law principle incorporated into our statutes at sec. 4216, modified by restricting the former unlimited presumption, as to time, to a period of ten years, that "the relation of landlord and tenant" being once established "the possession of the tenant shall be deemed the possession of the landlord until the expiration of ten years from the termination of the tenancy," or in case of the relation not being evidenced by a written lease, "until the expiration of ten years from the time of the last payment of rent." This significant element, not to be overlooked, was added: "notwithstanding such tenant may . . . have claimed to hold adversely to his landlord; but such presumption shall not be made after the periods herein limited."

That statute was borrowed from New York. It is recognized there that the presumption in favor of the lessor is not a legal estoppel or conclusive. In *Bradt v. Church,* 110 N. Y. 537, 18 N. E. 357, and *Bedlow v. New York F. D. D. Co.* 112 N. Y. 263, 19 N. E. 800, cited in the former opinion, it was expressly held that it would yield to proof of actual, notorious possession for the statutory terms in defiance of the landlord's title, in harmony with other cases, particularly *Willison v. Watkins,* 3 Pet. 43, to the effect that proof of actual, notorious, hostile possession for the statutory period, characterized by unequivocal, open, notorious treatment of the property as owner, displaces the statutory the same as it does the common-law presumption which it declares so far as the lawgivers saw fit to adopt it. That is in harmony with sec. 4210, Stats. (1898), which did not exist in New York

during the time the early decisions cited to our attention from that state were made, that proof of continuous adverse possession for ten years under a written instrument supersedes the presumption of possession in the holder of the legal paper title.

It must be remembered that the doctrine in New York, at the time many of the decisions called to our attention were made, was that there must be a taking of possession in honest belief of its being rightful and reliance thereon. *Jackson v. Andrews,* 7 Wend. 152; *Livingston v. Peru Iron Co.* 9 Wend. 511; *Clapp v. Bromagham,* 9 Cow. 530, 557. That was later repudiated and held to be inconsistent with the statutes. The court in *Humbert v. Trinity Church,* 24 Wend. 587, 608, speaking by COWEN, J., said:

"Statutes limiting real actions generally operate in favor of the men who cultivate the soil, or inhabit the dwelling houses of the country; and cannot discriminate between the rich and the poor, the powerful and the weak, the wise and the ignorant." They were "framed on the most salutary principle of general policy. They have, with great propriety, been termed statutes of repose. They fix a term broadly marked and easy of proof, at which litigation is arrested; beyond which every man is enabled to pronounce that his possessions are no longer open to disturbance. . . . Neither open wrong nor established fraud" can "be admitted as an exception without striking at the principle itself; neither can be received without proof, and that would bring back the very danger which the statutes were designed to obviate. . . . In the previous case of *Jackson v. Andrews,* 7 Wend. 152, even actual possession claimed under a deed was denied to be adverse for the purpose of disqualifying the real owner to convey, though clearly" by later adjudications "that would not be so of a deed invoked to make out a possession within the statutes of limitations. . . . The question is on the *quo animo,* the intent; not, I take it, as suggested in *Livingston v. Peru Iron Co.* 9 Wend. 511, the intent to claim honestly; but the intent to claim at all, right or wrong, with or without knowledge that another has title." After the lapse of the statutory period "it would be dangerous to open an inquiry upon the *bona fides* of the defendant's claim."

That has been often followed, it being said that under the statutes if one enters under color of title claiming ownership the possession will be adverse however groundless the title.

It must follow from what has been said, regardless of apparently conflicting authorities, that, by statute, if a person under any kind of a written instrument sufficient to convey title to realty and purporting to do so takes possession of a tract of land described therein, as owner, even from a tenant, and regardless of good faith, openly and hostile to the possessor of the title, under such circumstances as to challenge the right of the latter to his knowledge, if he pays reasonable attention to his affairs, adverse possession is initiated, which, if continued for the statutory term, displaces the presumption in favor of the true owner, both under sec. 4210 and sec. 4211, as well, and erects in its stead under such sections a presumption that all the requisites of title by adverse possession have been complied with, as held by numerous decisions of this court. *Ill. S. Co. v. Bilot,* 109 Wis. 418, 84 N. W. 855, 85 N. W. 402.

Notwithstanding the learned counsel's persistence in arguing that *Pulford v. Whicher,* 76 Wis. 555, 45 N. W. 418, is contrary to the foregoing and supports the claim that a grantee, in form in fee, if a tenant, cannot maintain adverse possession as to the landlord, we must adhere to our former view that it does not deal with the present situation at all. It is merely to the effect that, under the peculiar facts of that case, in equity the tenancy was not superseded by possession under a tax deed, so as to cut off the right of the owner under secs. 1189, 1210*d,* and 1210*e,* R. S. 1878, to avoid the taxes and deeds for illegality. The tenant under a fraudulent agreement turned over his tenancy, not by a conveyance in any form, to another who had obtained a tax deed upon the premises, and subsequently obtained a second tax deed upon a tax certificate owned by such other at the time of the commission of the wrong. The action was to avoid the tax deeds and for an accounting. The subject of adverse possession,

under the statutes here involved, was not in the case at all. The action was commenced within about eight years after the date of the first tax deed and the question was whether the collusive possession, which was entirely unknown to the plaintiff who resided in another state and relied upon an agent to deal with the tenant and pay the taxes, started the statute of limitations running in favor of the illegal tax claims. The complaint set forth the facts in much detail. The issue was raised by demurrer, pleading the tax-claim limitation statutes referred to, and the demurrer was overruled. With this full statement of the case, which is not disclosed by the report but is in connection with the printed case and briefs used on the appeal, which are at hand, we confidently reiterate what was said in the former opinion, that it has not the remotest bearing on the one before us. We apprehend that, had the nature of the *Pulford Case* been fully appreciated, it would not have been regarded as a straw to catch at as to the claim now made.

Pulford v. Whicher, supra, is the only case decided by this court in the sixty and more years of its history which counsel even claim supports their view that adverse possession cannot be predicated on a conveyance from a person in possession, bearing such relation to the true owner as to be under contract to restore possession to him. All the other cases here, comprising very many holding that a grantee, in form, of a fee taking possession under the grant as owner initiates adverse possession, regardless of his knowledge of the true state of the title, are contrary to counsel's contention, except *Watts v. Owens,* 62 Wis. 512, 520, 22 N. W. 720, which went off on the old doctrine that there can be no adverse possession in the absence of honest belief that the right coincides with the possession, which is out of harmony with cases before decided and years ago was repudiated.

One of the first cases here involving the question under discussion shows, most clearly, that the court started with the

idea that adverse possession under the ten-year statute is referable to the deed under which the entry is made and is not to be defeated merely because the grantee was under contract to restore possession to the true owner nor because of want of actual notice of the hostile claim to the owner. We refer to *Stevens v. Brooks,* 24 Wis. 326, before alluded to. The force of that decision can be appreciated when it is kept in mind that the rule contended for on common-law principles applies to the relation of mortgagor and mortgagee as well as to landlord and tenant. The claim was there made that the right of a grantee from a mortgagor in possession is measured by the right of the grantor, and as the latter's possession is not adverse the former cannot be. To that the court answered:

"Where one enters upon land under a recorded deed, his entry and claim are referred to that deed, and measured by it. If it is a warranty deed, purporting to give him a complete title, his possession becomes adverse to all the world. . . ." The mortgagee's "assuming to convey the fee of the land by warranty deed was, in itself, as decisive and clear a denial of the relation of mortgagor and mortgagee as can be required. And the purchaser entering under such warranty deed is presumed to claim the title which the deed professes to give him."

To the claim that possession of one under contract to restore to the owner cannot become adverse till notice to such owner of a denial of his right and intention to claim adversely to him, which had support in authorities cited, as it has in many cited now, the court said:

"I am not aware that, where one enters upon land claiming a perfect title, he is bound to give any other notice to other claimants than the possession itself, in order to set the statutes running, there having been shown no such previous relation between him and them as would require such notice. They must take notice at their peril of the real character of his possession. Whenever a contest arises, he may show it to have been adverse, if he can; and, in order to do that, may show under what claim of title he entered."

The mere circumstance of the recording of the deed was not spoken of as essential, but only as evidentiary, as the following will indicate:

"And where he entered under a recorded deed, he may show that. It is not shown to prove notice, as such, but to show the claim of title under which he held possession."

The logic of *Stevens v. Brooks,* 24 Wis. 326; *Willison v. Watkins,* 3 Pet. 43; and *Bradstreet v. Huntington,* 5 Pet. 402, is that the moment a tenant assumes to, and does, in form, convey in fee the property of which he is possessed and his grantee enters as owner under the deed, a fraud is committed upon the true owner entitling him to sue at once in ejectment or in trespass upon the theory of his having been disseised. That was the mooted question settled in *Willison v. Watkins.* The principle of the federal cases is fully indicated by the quotations made and this further from *Bradstreet v. Huntington:*

"The whole inquiry is reduced to the fact of entry and the intent to usurp possession. These are the elements of actual disseisin; and yet we have seen that one may become a disseisor, though entering peaceably under a void deed or a void feoffment or by fraud; and that the intention to disseise may, under circumstances, be imputed to those who by a general rule of law are in ordinary cases incapable of willing, or not bound by an exercise of the will. . . . The fact to be determined is whether the party holds possession for himself or for another; and this can only be determined by evidence, or circumstances to prove the one or the other. . . . Actual ouster is clearly not requisite, either to be presumed or proved; adverse possession may exist without it; and notice, as a fact, may clearly be deduced from circumstances as well as positively proved."

That discussion was directed to the question of whether actual adverse possession can "supply the exigency of actual ouster or notice," and it was held that it could.

The above statement was fully recognized by this court in *Ackerman v. Lyman,* 20 Wis. 454, 456, it being held that a

trespasser cannot be converted into a tenant without his consent. So here, the respondents, who the moment they openly entered as owners disseising the appellant became trespassers and could not without their consent be converted into tenants.

The foregoing was fully appreciated by Judge REDFIELD in *Sherman v. Champlain T. Co.* 31 Vt. 162, to be the logic of the federal cases, which he was pleased to denominate, as before indicated, "a new doctrine," though it was not so regarded by the federal court. To indicate the precise relations between the former landlord and a usurper, as in this case, the following from *Willison v. Watkins, supra,* was quoted:

"Had there been a formal lease for a term not yet expired, the lessee forfeited it by this act of hostility; had it been a lease at will from year to year, he was entitled to no notice to quit before an ejectment. The landlord's action would be as against a trespasser; as much so as if no relation had ever existed between them."

So the nature of respondents' possession is referable to their deed and the characteristics of the occupancy, not to the mere right of the grantor. The fact that they claimed openly and notoriously in all respects as an owner would and thus became disseisors regardless of any actual ouster, making themselves trespassers, who could not, at the election of the true owner alone, be turned into tenants, rendered them adverse possessors under secs. 4211 and 4212, Stats. (1898), so that a continuance of the condition for the statutory period prescribed in sec. 4215, the circumstances being such as must have brought such condition home to the true owner if it was paying ordinary attention to its affairs, displaced the presumption under sec. 4216, working a complete transition of the title by operation of law.

Cases out of harmony with the foregoing are out of harmony with our statutes and the logic of our decisions. If it be as suggested, that if this court adheres to the former view it will work repose to the titles involved in some eighty pend-

ing cases, that cannot well be regarded as justification for changing the statute and going contrary to the logic of the past on this subject. If, as said, the result of the court's adherence to the statute and its previous administration thereof will create such repose, it is a striking indication of the wisdom of the law.

The supposed inequity of applying the statutes, as indicated, grows out of misconception, it seems, of the policy of the law and mistaken notion that they are susceptible of being minimized in their literal effect, out of compassion to owners of property liable to lose by laches. Apt comment on that is found in the opinion by Mr. Justice DODGE in *McCann v. Welch,* 106 Wis. 142, 81 N. W. 996, quoted from, at length, in the former opinion. Other courts made like comments. In *Bell v. Morrison,* 1 Pet. 351, 360, the federal court, speaking by Mr. Justice STORY, used this language:

"It has often been matter of regret, in modern times, that, in the construction of the statute of limitations, the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that, instead of being viewed in an unfavorable light, as an unjust and discreditable defense, it had received such support as would have made it, what it was intended to be, emphatically, a statute of repose. It is a wise and beneficial law. . . . The English decisions upon this subject have gone great lengths—greater, indeed, in our judgment, than any sound interpretation of the statute will warrant; and, in some instances, to an extent which is irreconcilable with any just principle. There appears, at present, a disposition on the part of English courts to retrace their steps; and, so far as they may, to bring back the doctrine to sober and rational limits. The American courts have evinced a like disposition."

Any other result than that herein indicated would fail to give effect to the statutes and put secs. 4210, 4211, and 4213 in direct conflict with sec. 4216. Under the former, one having been in actual continuous adverse possession of realty under color of title for the statutory period would be the owner

thereof, while under the latter he would not under any circumstances.

Our conclusion gives effect to the statutes bearing on the subject as they are written. A person whose possession is usurped by another may prove his right, *prima facie,* by proof of the former condition, the title in that case resting on presumption. The now paramount presumption may be displaced under sec. 4210 by mere establishment of the legal title in the one dispossessed, creating a presumption of seisin in the holder of such title within the period of the statute of limitations, which is rebuttable as in case of the preceding presumption. The now paramount presumption may be displaced under secs. 4210 and 4211 by mere proof of continuous ten-year possession pursuant to an entry, exclusively based on color of title, thus creating a presumption that the possession for such period has been characterized with all the essentials of disseisin of every other claimant of the property, which presumption is rebuttable as before and may be by proof in the absence of efficient explanatory circumstances, that the purported conveyance was a medium of conveying a tenancy created by the holder of the legal title and existing at the time the conveyance, creating a presumption under sec. 4216 that the possession under such conveyance was the possession of the holder of the legal title notwithstanding a mere claim of adverse possession—subject to be rebutted as before by proof, as a verity, that the possession was taken under such conveyance as owner actually adverse to all the world and in open notorious defiance of other claimants, and a continuation of such condition of actual notorious adverse possession, undisturbed for the statutory period of ten years. This last, as will be seen, is not a case of a tenant or his successor in possession, originating a claim of adverse possession, but of a possession commencing under an assertion, in the very nature of the case, of hostile title, the grantee having no notice of the tenancy and under such circumstances, as in this

case, necessarily bringing home to the holder of the legal title notice of the hostile invasion. As said in the cited cases, the adverse character of the holding effectually disseises such holder and sets the statutes of limitations running.

Without further discussing the subject it is the opinion of the court that the conclusion reached on the hearing is right and that the motion for a rehearing must be denied

By the Court.—So ordered.

C. BECK COMPANY, Appellant, vs. CITY OF MILWAUKEE, Respondent.

February 16—May 11, 1909.

Municipal corporations: Charter authority: Ordinances: Constitutional law: Class legislation: Violation of ordinances: Enforcement: Exercise of power to pass ordinances: Construction of ordinances: Delegation of legislative power: Exercise of delegated powers: "Beach:" "Shore:" Injunction: Grounds: Navigable waters: Lands under water: Ownership.

1. An ordinance of the city of Milwaukee designed to protect its harbor by prohibiting the removal of stone, sand, or earth from the beach or from the water within 300 feet of high-water mark, along the shore of Lake Michigan between the northern and southern limits of the city, is authorized by charter provisions granting the city the right "to preserve the harbor, to prevent any use of the same or any act in relation thereto tending in any degree to fill up or obstruct the same."
2. Such ordinance is valid municipal legislation as to portions of the beach of Lake Michigan taken into Milwaukee by extension of its boundaries after the passage of such charter.
3. An ordinance of the city of Milwaukee which prohibits under penalty the removal of stone, sand, or earth from the beach or from the water within 300 feet of high-water mark, along or near the shore of Lake Michigan between the northern and southern limits of the city, is not objectionable as class legislation.
4. The violation of a city ordinance which does not make such violation criminal, but provides a penalty, is not a misdemeanor.

and recovery of the penalty is by a civil action under the ordinance.

5. While the power of a municipal corporation to pass ordinances must be reasonably exercised, within the field delegated it may go to the boundaries of reason, and within that field its discretionary power is supreme.

6. Municipal ordinances must receive a reasonable construction in the light of the purpose of their enactment; and, where they are capable of a construction that will carry out their manifest purpose, such construction must be adopted.

7. The legislature may, for public purposes, delegate legislative power to a municipality to protect its harbors.

8. In the exercise of delegated legislative powers, a municipality having power to protect its harbors may prohibit the removal of materials below ordinary high-water mark when such removal may be injurious to the harbor.

9. A municipal ordinance which prohibits under penalty the removal of stone, sand, or earth from the beach or from water within 300 feet of high-water mark, along or near a navigable lake between the limits of the municipality, does not assume to prohibit interference above high-water mark, but prohibits the removal of such materials from the beach or from the water within 300 feet of high-water mark, along or near the shore of the lake; the word "beach" being synonymous with "shore"—that portion between ordinary high-water and low-water mark.

10. Under a valid municipal ordinance prohibiting under penalty the removal of material from the beach or from water within 300 feet of high-water mark, along or near a navigable lake, threats by the municipality to prevent an owner from removing material above high-water mark do not justify an injunction restraining the municipality from enforcing such ordinance.

11. Where a city has power under its charter to protect its harbor, defined so as to include frontage on a navigable lake to a distance of one mile from the shore, an ordinance prohibiting the removal of material from the beach or from the waters within 300 feet of high-water mark along the shore does not infringe private rights of riparian owners.

12. The title to the bed of Lake Michigan below ordinary high-water mark is in the state.

MARSHALL, J., dissents.

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

This is an appeal from an order dissolving a temporary

injunction. The action was brought to restrain the defendant city of *Milwaukee* from enforcing an ordinance which prohibits under penalty the removal of "stone, sand, or earth from the beach or from the water within 300 feet of high-water mark, along or near the shore of Lake Michigan between the extreme northern limit and extreme southern limit of the city." The complaint charges that the ordinance is void and that the defendant city threatens to enforce it to the injury of plaintiff; that plaintiff is the owner of certain lots and in possession of other land which abuts on Lake Michigan; and that the beach of said lake is a portion of said lots, and that there accumulates on said lots above high-water mark sand, stone, and gravel which is valuable. The complaint also alleges that the defendant threatens to prosecute plaintiff for taking materials from the beach on the lots in question above high-water mark. The prayer is to the effect that the ordinance be declared void and that the defendant city be enjoined from enforcing or attempting to enforce it, and from making any complaint thereunder, and from prosecuting any proceedings against this plaintiff or its agents, servants, or employees by reason of any alleged act in contravention of said ordinance; that pending this action, and until the further order of the court, the said defendant, its agents, servants, attorneys, and employees may be temporarily enjoined and restrained from enforcing said ordinance or from commencing or prosecuting any complaint or proceeding against the plaintiff, or its agents, servants, or employees for any alleged act in contravention of said ordinance, and that this plaintiff may have its costs and disbursements and such other further judgment, order, or relief in the premises as may be just and equitable.

Upon this complaint an order was made enjoining and prohibiting the city of *Milwaukee,* its agents, servants, attorneys, and employees from enforcing the ordinance referred to, and from commencing or prosecuting any complaint or proceed-

ing against the plaintiff, its agents, servants, or employees for any alleged act in contravention of said ordinance. Defendant answered, denying that plaintiff will be in any way injured by the enforcement of the ordinance, and setting up, in effect, that the acts of the defendant threatened are necessary for the protection of the shore line and uplands and the streets of the city from encroachment by the waters of the lake and preservation of the streets and private property from destruction, and specifically denied that the plaintiff had been confining its operations to the land above high-water mark, but below and at the foot of public streets touching the shore along the beach in question.

Upon motion to dissolve the temporary injunction certain affidavits were used, and a stipulation to the effect that affidavits in another action pending might also be considered, and it appears that on the showing made upon the motion to dissolve there was a dispute as to the shore line and whether the plaintiff was in fact taking sand and material from below high-water mark and doing injury to the beach below high-water mark. The court dissolved the temporary injunction and the plaintiff appealed from the order.

For the appellant there was a brief by *Kronshage, McGovern, Goff, Fritz & Hannan,* attorneys, and *Walter D. Corrigan,* of counsel, and oral argument by *Guy D. Goff.* They contended, *inter alia,* that an ordinance not warranted by the charter is void and can furnish no justification to persons acting under its authority. *Greensboro v. Ehrenreich,* 80 Ala. 579; *Stafford v. Chippewa Valley E. R. Co.* 110 Wis. 331, 351; *Morgenroth v. Milwaukee,* 125 Wis. 663, 669; *Eastern Wis. R. & L. Co. v. Hackett,* 135 Wis. 464, 115 N. W. 376, 381; *Ellinwood v. Reedsburg,* 91 Wis. 131, 133, 134; *Hayes v. Appleton,* 24 Wis. 542; *Barling v. West,* 29 Wis. 307; *Brooklyn v. Furey,* 30 N. Y. Supp. 349; *Madison v. Mayers,* 97 Wis. 399; *State ex rel. Garrabad v. Dering,* 84 Wis. 585; *Tilly v. Mitchell & L. Co.* 121 Wis. 1; *LeFeber v. West Allis,*

119 Wis. 608, 97 N. W. 203; *Austin v. Austin City C. Asso.* 87 Tex. 330; *Mugler v. Kansas,* 123 U. S. 623, 661; *People v. Armstrong,* 73 Mich. 288, 41 N. W. 275; *Miller v. Burch,* 32 Tex. 208; *State ex rel. Wis. Tel. Co. v. Sheboygan,* 111 Wis. 23, 38; *Taylor v. Griswold,* 14 N. J. Law, 222. The ordinance in question is not justified under the police power. *Luther v. Borden,* 7 How. 1; *In re Wilshire,* 103 Fed. 620, 622; *Chicago v. O'Brien,* 111 Ill. 532; *State v. Redmon,* 134 Wis. 89, 114 N. W. 137; *Marbury v. Madison,* 1 Cranch, 137; *State ex rel. Adams v. Burdge,* 95 Wis. 390, 398, 70 N. W. 347, 349, 37 L. R. A. 157, 60 Am. St. Rep. 123. The ordinance in question is not due process of law. It seeks to limit or restrain the plaintiff in the use of its own property. To pass a law depriving a person of this right without compensation is to deprive him of his property without due process of law. *Eaton v. B. C. & M. R. Co.* 51 N. H. 504; *Wynehamer v. People,* 13 N. Y. 378; *People v. Kerr,* 37 Barb. 357; *State v. Loomis,* 115 Mo. 307; *Comm. v. Perry,* 155 Mass. 117; *In re Jacobs,* 98 N. Y. 98; *People v. Gillson,* 109 N. Y. 389; *Millett v. People,* 117 Ill. 294; *Ritchie v. People,* 155 Ill. 98; *Janesville v. Carpenter,* 77 Wis. 288; *Holden v. James,* 11 Mass. 396, 6 Am. Dec. 174; *Bull v. Conroe,* 13 Wis. 233; *Durkee v. Janesville,* 28 Wis. 464, 9 Am. Rep. 500; *Calder v. Bull,* 3 Dall. 386, 387, 388; *Delaplaine v. C. & N. W. R. Co.* 42 Wis. 214; *Passaic v. Paterson B. P., A. & S. P. Co.* 72 N. J. Law, 285; *Comm. v. Boston A. Co.* 188 Mass. 348; *In re Kelso,* 147 Cal. 609, 82 Pac. 241; *Huber v. Merkel,* 117 Wis. 355; *State ex rel. Zillmer v. Kreutzberg,* 114 Wis. 530; *Bland v. People,* 32 Colo. 319, 76 Pac. 359; *Slaughter-House Cases,* 16 Wall. 36, 21 L. Ed. 394; *In re Scrip Bill,* 23 Colo. 504, 48 Pac. 512; *Block v. Schwartz,* 27 Utah, 387, 76 Pac. 22; *Bank v. Divine G. Co.* 97 Tenn. 603, 37 S. W. 390; *People ex rel. Manhattan S. Inst. v. Otis,* 90 N. Y. 48; *State v. Goodwill,* 33 W. Va. 179, 25 Am. St. Rep. 863, 10 S. E. 285, 6 L. R. A. 621; *State v.*

Loomis, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789; *People v. Gillson,* 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *Butchers' U. S. H. & L. S. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585. The ordinance in question is open to the criticism of class legislation in that it does not refer to all owners of city lots as a class, but relates only to those who own lots along or near the lake shore between the extreme northern and southern limits of the city. *State ex rel. Kellogg v. Currens,* 111 Wis. 431; *State v. Evans,* 130 Wis. 381, 385; *Atchison, T. & S. F. R. Co. v. Matthews,* 174 U. S. 96, 104; *Servonitz v. State,* 133 Wis. 231, 113 N. W. 277, 279; *State ex rel. Risch v. Trustees,* 121 Wis. 44, 54, 98 N. W. 954; *Barbier v. Connolly,* 113 U. S. 27.

For the respondent there was a brief by *John T. Kelly,* city attorney, and *Walter H. Bender,* assistant city attorney, of counsel, and oral argument by *Mr. Bender.* They contended, *inter alia,* that in this particular case the vacation rather than the continuance of the temporary injunction operated to preserve the *status quo. Valley I. Works Mfg. Co. v. Goodrick,* 103 Wis. 436, 444, 445; *Milwaukee E. R. & L. Co. v. Bradley,* 108 Wis. 467, 486; *Quayle v. Bayfield Co.* 114 Wis. 108, 113; *Bartlett v. L. Bartlett & Son Co.* 116 Wis. 450, 460; *DePauw v. Oxley,* 122 Wis. 656, 659. The defendant city possesses the following powers: *First,* those granted in express words; *second,* those necessarily or fairly implied in or incident to the powers expressly granted; *third,* those essential to the declared objects and purposes of the corporation, not simply convenient but indispensable. 1 Dill. Mun. Corp. (4th ed.) sec. 89; *Trester v. Sheboygan,* 87 Wis. 496, 498, 499; *Becker v. La Crosse,* 99 Wis. 414, 417; *State ex rel. Wis. Tel. Co. v. Sheboygan,* 111 Wis. 23. The ordinance in question is not class legislation, since there must exist a real class before there can be created a legislative class. *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 37; *Adams v. Beloit,*

105 Wis. 363; *State ex rel. Kellogg v. Currens,* 111 Wis. 431, 436; *Black v. State,* 113 Wis. 205, 219; *State ex rel. Zillmer v. Kreutzberg,* 114 Wis. 530, 549; *Huber v. Merkel,* 117 Wis. 355, 366; *State ex rel. Risch v. Trustees,* 121 Wis. 44, 51; *Bingham v. Milwaukee Co.* 127 Wis. 344; *State v. Evans,* 130 Wis. 381, 385; *Lawton v. Steele,* 152 U. S. 133. The ordinance does not make a crime of an innocent act. It is not a criminal or *quasi*-criminal ordinance. Its violation is not a misdemeanor. It simply gives the respondent city the right to recover the prescribed penalty in a civil action brought for that purpose. *State v. Hayden,* 32 Wis. 663, 669; *Boscobel v. Bugbee,* 41 Wis. 59, 64; *Platteville v. Bell,* 43 Wis. 488, 491; *State v. Smith,* 52 Wis. 134; *Platteville v. McKernan,* 54 Wis. 487–489; *Oshkosh v. Schwartz,* 54 Wis. 483, 487; *Chafin v. Waukesha Co.* 62 Wis. 463, 466, 467; *State v. Grove,* 77 Wis. 448, 450, 451; *State ex rel. Hamilton v. Municipal Court,* 89 Wis. 358, 361, 362; *Milwaukee v. Simons,* 93 Wis. 576, 577; *Milwaukee v. Weiss,* 93 Wis. 653, 654; *State ex rel. Milwaukee v. Newman,* 96 Wis. 258, 265, 266; *Ogden v. Madison,* 111 Wis. 413, 421, 428, 429; *State ex rel. Dunlap v. Nohl,* 113 Wis. 15, 24; *Stoltman v. Lake,* 124 Wis. 462, 464, 466; *Olson v. Hawkins,* 135 Wis. 394, 116 N. W. 18, 19. The ordinance in question, whether viewed as legislation under express charter authority or as an exercise of the police power, is reasonable. *Stafford v. Chippewa Valley E. R. Co.* 110 Wis. 331, 351; *Hayes v. Appleton,* 24 Wis. 542; *Barling v. West,* 29 Wis. 307, 315; *Clason v. Milwaukee,* 30 Wis. 316; *Atkinson v. Goodrich T. Co.* 60 Wis. 141, 160; *LeFeber v. West Allis,* 119 Wis. 608, 613, 614; *Tilly v. Mitchell & L. Co.* 121 Wis. 1, 10; *Eastern Wis. R. & L. Co. v. Hackett,* 135 Wis. 464, 115 N. W. 376, 381; *Bonnett v. Vallier,* 136 Wis. 193, 116 N. W. 885, 888; McQuillan, Mun. Ord. 297, sec. 186; *State v. Sheppard,* 64 Minn. 287, 36 L. R. A. 305, 307; *Nicoulin v. Lowery,* 49 N. J. Law, 391, 8 Atl. 513; *Skinker v. Heman,*

64 Mo. App. 441, 449; *Heman v. Ring,* 85 Mo. App. 231, 235; *Comm. v. Cutter,* 156 Mass. 52, 29 N. E. 1146, 1147; *Comm. v. Plaisted,* 148 Mass. 375, 19 N. E. 224, 226; *Pa. R. Co. v. Jersey City,* 47 N. J. Law, 286, 288; *Rahway G. Co. v. Rahway,* 58 N. J. Law, 510, 34 Atl. 3; *Anderson v. State* (Neb.) 96 N. W. 149; *State v. Redmon,* 134 Wis. 89.

The following opinion was filed March 9, 1909:

KERWIN, J. It is contended by appellant that the defendant city had no power under the charter to pass the ordinance in question; that it is oppressive and unreasonable, in derogation of the common law and common right, and offends against the federal and state constitutions. The obvious purpose of the ordinance is to protect the harbor on Lake Michigan. This authority is clearly conferred by the city charter, which expressly grants to the city authority "to preserve the harbor, to prevent any use of the same or any act in relation thereto . . . tending in any degree to fill up or obstruct the same." It also authorizes the common council to prevent the incumbering of streets and alleys in any manner and to protect them from encroachment or injury. There can be no doubt but that the city had power to pass the ordinance in question. *Clason v. Milwaukee,* 30 Wis. 316. It is claimed by appellant that because the beach in question was taken into the city of *Milwaukee* by extension of its boundaries after the passage of the charter in 1874, which contained the provision respecting the protection of the harbor above referred to, such authority delegated to the city only extends to the corporate limits embraced within the limits of the city in 1874. It is clear from other provisions of the city charter respecting extension of boundaries, as well as sec. 1, ch. 9, of the charter of the city of *Milwaukee,* which includes in the harbor of the city the lake frontage to a distance of one mile from the shore, that this position is untenable. Nor do we think the ordinance is objectionable as class legislation, under

the repeated decisions of this court. *State v. Whitcom,* 122 Wis. 110, 99 N. W. 468; *Black v. State,* 113 Wis. 205, 89 N. W. 522. We need not rest upon the general welfare clause of the charter or upon implied power for authority to pass the ordinance, since express authority to protect the harbor is granted by the charter, and we find nothing in the ordinance, when properly interpreted, in conflict with the state or federal constitutions or any law of the state. And while there is abundance of authority, from early times down to the present, upholding the power of municipalities to protect by proper regulations their harbors, we need not go outside of the decisions of this court upon the subject. *Clason v. Milwaukee, supra,* is directly in point, so far at least as the power of the city to pass such ordinance is concerned. The operation of the ordinance is plainly confined to the beach and such distance into the water as is necessary for the protection of the harbor and does not in terms infringe private rights. It does not make the violation of it a criminal offense, but provides a penalty for its violation. Its violation is not a misdemeanor. Recovery of the penalty is by civil action under the ordinance. *Stoltman v. Lake,* 124 Wis. 462, 102 N. W. 920; *Koch v. State,* 126 Wis. 470, 106 N. W. 531; *Olson v. Hawkins,* 135 Wis. 394, 116 N. W. 18. It is true that the power of a city to pass ordinances must be reasonably exercised, but within the field delegated it may go to the boundaries of reason, and within that field its discretionary power is supreme. *Stafford v. Chippewa Valley E. R. Co.* 110 Wis. 331, 85 N. W. 1036. The city in passing the ordinance in question being within its power to pass ordinances for the protection of the harbor, we think the question is ruled by *Clason v. Milwaukee, supra,* and the ordinance valid.

Of course ordinances must receive a reasonable construction in the light of the purpose of their enactment, and if they are capable of a construction which will carry out the manifest purpose of the enactment such construction must

be given them. The ordinance in question cannot be construed as contended by appellant, namely, that it is unreasonable, because the taking of a handful of sand or a stone would violate it. This contention involves the construction of the ordinance and not the validity of it. The ordinance upon its face could not be held to embrace such a case, for it must receive a reasonable rather than an unreasonable construction. *Clason v. Milwaukee,* 30 Wis. 316; McQuillan, Mun. Ord. 297; *State v. Sheppard,* 64 Minn. 287, 67 N. W. 62; *Nicoulin v. Lowery,* 49 N. J. Law, 391, 8 Atl. 513; *Skinker v. Heman,* 64 Mo. App. 441; *Comm. v. Cutter,* 156 Mass. 52, 29 N. E. 1146; *In re Anderson,* 69 Neb. 686, 96 N. W. 149. The delegation of authority to the city to protect its harbor being for a public purpose and the exercise of it reasonable, the ordinance is valid. *LeFeber v. West Allis,* 119 Wis. 608, 97 N. W. 203; *Eastern Wis. R. & L. Co. v. Hackett,* 135 Wis. 464, 115 N. W. 376. The legislature has power to confer upon the defendant city, for public purposes, the right to protect the harbor, and the city in the exercise of such delegated authority was clothed with power to prohibit the removal of material below ordinary high-water mark when such removal was injurious to the harbor. This is all the city attempts to do, by a fair construction of the ordinance. Whether it would have the right to regulate the use of the land above ordinary high-water mark or interfere with private rights without making compensation and against the will of the abutting owners we need not consider, because the ordinance does not cover such a case.

It was held in *Mears v. Dole,* 135 Mass. 508, that an abutting owner could not excavate on his own land in such manner as to let in the sea, which undermined and injured adjoining land of another, without liability to the persons so injured. So, also, *Freeland v. Pa. R. Co.* 197 Pa. St. 529, 47 Atl. 745. But since the case is here only on the order dissolving the temporary injunction, we do not regard it ad-

visable to lay down rules of law respecting questions of fact not before us. It is sufficient for the purposes of this case to determine that the ordinance is valid and under it the city has the right to prevent injurious interference with the beach. The ordinance does not assume to prohibit interference above high-water mark, and whether the plaintiff was removing sand and material below high-water mark seems to have been a disputed question on the hearing to dissolve the injunction. Of course if the plaintiff was not, but confined its operations to land above high-water mark, the ordinance did not reach it, and no case was made to restrain its enforcement. The ordinance prevents the removal of stone, sand, or earth from the beach or from the water within 300 feet of high-water mark along or near the shore of Lake Michigan. Clearly the authority of the city under the power delegated extended at least to ordinary high-water mark, and so the city was within its rights in passing the ordinance. The temporary injunction absolutely enjoined the enforcement of the ordinance, and enjoined defendant from commencing or prosecuting any complaint, or proceeding against the plaintiff for any alleged act in contravention of the ordinance. So we think it clear that the order dissolving the temporary injunction was right. It is true that the plaintiff claimed in its complaint and also upon the hearing to dissolve the injunction that the city, its agents and servants, threaten to prevent it from removing sand and material above high-water mark. But such claim or pretense was no justification for restraining the city from the enforcement of a valid ordinance which authorized the prevention of removal of sand and material from below ordinary high-water mark. The beach as designated in the ordinance is synonymous with shore, and must be held to mean that portion of the shore of the lake between ordinary high and low-water mark. *Elliott v. Stewart,* 15 Oreg. 259, 14 Pac. 416; *Storer v. Freeman,* 6 Mass. 435; *Cutts v. Hussey,* 15 Me. 237; *Trustees of East*

Hampton v. Kirk, 68 N. Y. 459; *Littlefield v. Littlefield,* 28 Me. 180. As to the meaning of the term "high-water mark," see Gould on Waters, § 45; *Carpenter v. Comm'rs of Hennepin Co.* 56 Minn. 513, 58 N. W. 295; *Houghton v. C., D. & M. R. Co.* 47 Iowa, 370; 1 Bouv. Law Dict. 947.

It is alleged in the complaint that the defendant threatened to prevent the removal of sand and material above high-water mark; but, even if the city did so threaten, such acts were not within the ordinance and afforded no ground for restraining the proper execution of it. So if the plaintiff could maintain an action in equity against the city to prevent interference with its property above ordinary high-water mark, it must be independent of the ordinance and without any relation to it. Hence such a case, even if made, would afford no grounds for restraining the enforcement of the ordinance. The showing is ample that the removal of sand and material from the beach would be injurious and that the prevention of it is plainly within the delegated power of the city. The title to the bed of the lake below ordinary high-water mark is in the state. *Delaplaine v. C. & N. W. R. Co.* 42 Wis. 214; *Diedrich v. N. W. U. R. Co.* 42 Wis. 248. The private rights of plaintiff are therefore not infringed. If the ordinance extended in its operation above high-water mark and upon the land and fee of the plaintiff, a different question would be presented and the authorities cited would be pertinent. We are therefore of opinion that the ordinance is valid and that the order dissolving the injunction was right and should be affirmed.

By the Court.—It is so ordered.

MARSHALL, J. (*dissenting*). We have an anomalous situation in the actions of *Damman v. Milwaukee* [*post,* p. 356] and *C. Beck Co. v. Milwaukee* [*ante,* p. 340]. The opinion of the court is the same in each case. What I say in one applies to the other. Except as specially stated my references

will be to the last case mentioned. Plaintiff commenced the action to prevent the defendant from interfering with its operations, on its own land, above the line of ordinary high-water mark of Lake Michigan. The ordinance, in terms, prohibits any person from removing or carrying away any stone, sand, or earth from the beach or from the water within 300 feet of high-water mark of the lake, within certain limits which includes the shore line of plaintiff's premises.

The meaning of the term "beach" as construed by respondent is, that it extends above the shore line including flats not at any time covered by ordinary water. That was accepted by appellant. The latter insisted upon using its land above the ordinary high-water mark line, regardless of the ordinance, and respondent insisted it should not. Appellant contended the ordinance was void, only upon the theory that its scope was as claimed by respondent. The whole controversy, as I understand it, was over whether respondent had a right, by virtue of the ordinance, to interfere with appellant's use of its land above the ordinary high-water mark. Can there be any question about that?

We will answer the question propounded by quoting this language from the complaint in the *Damman Case:*

"The said city, its agents, servants, and attorneys, have given out and threatened and they do give out and threaten that they will cause to be arrested and fined the agents, servants, or employees of this plaintiff who may at any time be engaged in the removal or carrying away of any stone, sand, or earth from the beach on said lots *above high-water mark,* and that on March 15, 1908, the said defendant city, by its officers and agents, caused the arrest of two of the servants of this plaintiff, . . . upon a charge that . . . contrary to the provisions of said ordinance, had taken, removed and taken away stone, sand, and earth from the beach *above high-water mark* and on the lots above described . . . and threaten that they will . . . cause to be arrested and fined other agents, servants, and employees of this plaintiff who may remove earth, . . . from the beach on said lots *above high-water*

mark. . . . The removal of any stone . . . from such beach . . . *above high-water mark* would be and is without harm or injury to the said defendant," etc.

Thus it will be seen, there was no manner of complaint made of interference with appellant's operations, except above the line of *high-water mark.*

Neither the answer nor any of the papers in the injunction proceedings changed the situation. True, it is said in one of the papers that appellant has removed sand from below ordinary high-water mark, but the issue joined on complaint and answer is as to whether, under the ordinance, respondent was justified in pursuing appellant with a multiplicity of prosecutions for a multiplicity of acts of removing material from *above the line of ordinary high-water mark.*

If the injunction order had been limited in its scope, as it should have been, to that of the complaint, it would only have restrained the particular interferences alleged. It was made broader, evidently, because of the claim on one side and conceded on the other, for the purposes of the case, that the ordinance goes to the extent of controlling the use of lands above the line of ordinary high-water mark as well as for 300 feet below it. It was on that theory, and on that alone, that the validity of the ordinance was challenged on the one side and defended on the other.

Now the result as to the very thing which appellant contended for is that the ordinance, if it were to be construed as having been intended to prevent appellant from using its property above the line of high-water mark, would be, to that extent, void, and that, so far as respondent prosecuted appellant or its agents for using the property, it committed a remediable wrong, and, so far as it threatened to further interfere with such operations, its attitude was that of unlawful prejudicial menace. Does it not follow, under a familiar principle of equity jurisprudence, that it was competent for appellant to protect itself against the multiplicity of

unlawful interferences by invoking equity jurisdiction to that end, and, the case being reasonably clear, that it was entitled to temporary protection by an *interim* injunction, preserving the *status quo* till the termination of the litigation? I see no reason why not.

Notwithstanding such situation, merely because the ordinance, rightly construed, so as to restrict it to a field respecting which no complaint is made, is valid, appellant is condemned to pay full costs in this court and submit to a situation which will, naturally, lead to a dismissal of its action in the court below, with costs. In other words, appellant, as to the real controversy, prevails, yet because, taking the respondent at its own false pretense as to the scope of the ordinance, it sought, incidental to protection of its right to use its property, to have the ordinance declared void, instead of to have it properly construed and interference outside thereof restrained, it must go out of court and be mulcted in costs in this and the lower court.

True, if the situation were not one proper for equitable interference to prevent a multiplicity of suits; if the complaint, had it been only for injunctional relief, conceding the ordinance to affect only operations below the line of ordinary high-water mark, would not state facts sufficient to constitute a cause of action in equity, the result here would be right, but the hypothesis is false, on principle, and if there were some doubt about it, the doubt should, in this case, be resolved in favor of appellant, since sufficiency of the complaint is not challenged, but is rather conceded, respondent joining with appellant in an effort to have the real right of the matter decided in this case.

Counsel for respondent were challenged from the bench as to whether the sole controversy was not respecting the right of the city, under the ordinance, to prevent appellant from taking sand from his premises above the line of ordinary

high-water mark, and, after some hesitation, that was conceded.

If there were any doubt as to the competency of a court of equity to protect one from a multiplicity of groundless prosecutions, which in my opinion there is not, on principle, it would be solved in the affirmative by *Milwaukee E. R. & L. Co. v. Bradley,* 108 Wis. 467, 84 N. W. 870, and *Joseph Schlitz B. Co. v. Superior,* 117 Wis. 297, 93 N. W. 1120.

Moreover the ordinance, as it has been construed by respondent, is a substantial cloud on appellant's title which it is competent for a court of equity to remove.

I have no doubt of the right of the city under its charter to protect the harbor proper, which extends outward from ordinary high-water mark. I do not see that the question was passed upon in *Clason v. Milwaukee,* 30 Wis. 316. My brethren refer to that as having settled the question, while as I read the decision the power was merely assumed for the purpose of the decision. In other states the matter has been directly passed upon, notably in *Comm. v. Tewksbury,* 11 Met. 55.

The reference in the opinion to *Mears v. Dole,* 135 Mass. 508, and *Freeland v. Pa. R. Co.* 197 Pa. St. 529, 47 Atl. 745, I fear is liable to mislead. They are authorities respecting the right of a property owner, in certain cases, to prevent another from using his land so as to impair such owner's premises. They do not deal with the right of the public, but cover an entirely different field from the one dealt with by the ordinance in question.

It would seem, in view of the foregoing, that the court below should have modified the injunctional order instead of setting it aside. The rule is that on a motion to vacate such an order, if it is only partly wrong, it should be modified accordingly. *A. H. Stange Co. v. Merrill,* 134 Wis. 514, 115 N. W. 116. So, my judgment is, that the proper disposi-

tion of the appeal is to modify the order complained of so as to only prevent the respondent from enforcing the ordinance by interfering with appellant's right to use its property above the line of ordinary high-water mark, and to award appellant costs in this court to the extent of clerk's fees, attorney's fees, and a moderate amount for printing.

A motion for a rehearing was denied May 11, 1909.

DAMMAN, Appellant, vs. CITY OF MILWAUKEE, Respondent.

February 16—May 11, 1909.

C. Beck Co. v. Milwaukee, ante, p. 340, followed.

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Kronshage, McGovern, Goff, Fritz & Hannan*, attorneys, and *Walter D. Corrigan*, of counsel, and oral argument by *Guy D. Goff*.

For the respondent there was a brief by *John T. Kelly*, city attorney, and *Walter H. Bender*, assistant city attorney, of counsel, and oral argument by *Mr. Bender*.

The following opinion was filed March 9, 1909:

PER CURIAM. This case is similar in principle to *C. Beck Co. v. Milwaukee, ante*, p. 340, 120 N. W. 293, and is ruled by that case. The order dissolving the injunction must therefore be affirmed.

By the Court.—It is so ordered.

MARSHALL, J. (*dissenting*). See opinion filed in *C. Beck Co. v. Milwaukee.*

A motion for a rehearing was denied May 11, 1909.

HASBROUCK, Appellant, vs. ARMOUR & COMPANY and another, Respondents.

February 18—May 11, 1909.

Appeal and error: Theory of cause: Review: Action: Joinder of causes of action: Pleading: Construction of allegations: Legal conclusions: "Negligence" defined: Breach of duty: Liability: Guaranty: Warranty.

1. Where the averments of a complaint are appropriate to an action in tort, and the pleader in his brief, on appeal from an order sustaining a demurrer thereto, asserts that the action is in tort founded upon negligence alleged in such complaint, the appellate court will not consider whether or not there is intent to state any other or different cause of action.
2. Before a court can determine whether or not two causes of action are improperly united, it must ascertain whether there are two causes of action and then determine whether they are such as may be united.
3. In an action against two defendants, the complaint averring successive sales of a commodity by one defendant to the other and by the other to the plaintiff, an averment that both defendants "jointly caused to be placed upon the market and to be sold to the general public" such commodity is a legal inference of the pleader from the specific facts otherwise appearing in the complaint.
4. "Negligence" in the law consists of the omission or inadvertently wrongful exercise of duty, which omission or exercise is the legal cause of damage to another.
5. Such duty may, by operation of law, arise between two persons in contract relations, or may be imposed independently of contract relations by the written or unwritten law, or may be due to persons or to particular classes of persons. Such duty is, not to never fail, but not to fail under such circumstances that a reasonably prudent person might infer injury, as a natural and ordinary consequence of such failure, to one to whom the duty is due.
6. With respect to the breach of a duty due from one person to all persons the liability of the wrongdoer does not depend upon privity between himself and the person injured.
7. The duty which the law imposes in favor of the user or consumer upon a manufacturer or dealer selling at wholesale to dealers generally, but not to consumers directly, is identical with the

duty imposed by law on all persons with respect to the public generally, and there is no privity, no particular relation carrying with it special duties or a special degree of care in such cases.

8. A manufacturer or dealer who puts out, sells, or delivers, without notice to others of its dangerous qualities, an article which invites a certain use, and which article is not inherently dangerous, but which by reason of negligent construction he knows to be imminently dangerous to life and limb, or is manifestly dangerous when used as it is intended to be used, is liable to any person suffering an injury therefrom, which injury might have been reasonably anticipated.

9. A manufacturer or dealer who puts out and sells articles inherently dangerous, without notice of their dangerous nature, or with a misleading notice, or negligently in any other way, is liable for an injury to any third person which might have been reasonably foreseen by the manufacturer or dealer in the exercise of ordinary care.

10. A manufacturer or dealer who makes and sells an article intended to preserve or affect human life is liable to third persons sustaining injury caused by his negligence in preparing, compounding, labeling, or directing the use of the article, provided injury to others might have been reasonably foreseen in the exercise of ordinary care.

11. A guaranty or warranty not knowingly false or fraudulent does not affect liability in tort for negligence.

12. An unintentional or negligent dropping of a needle into a mixture from which toilet soap is made is so remote a possibility, such an extraordinary occurrence, and serious injury to the consumer from using such soap for toilet purposes such an unusual and remote consequence of such act, that thereby there is no breach of a duty imposed upon the manufacturer for the protection of the vendee of his vendee, and no actionable negligence is shown.

13. In such case the retailer, who did not know that the needle was imbedded in the soap, and who could not by the exercise of ordinary care have ascertained its presence therein, is not liable for injuries resulting to the purchaser from the needle.

DODGE and BARNES, JJ., dissent.

APPEAL from an order of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

The appeal is from an order sustaining separate demurrers of the respondents to appellant's complaint.

For the appellant there was a brief by *Eaton & Eaton,* at-

torneys, and *H. B. Jackson,* of counsel, and oral argument by *Mr. M. H. Eaton* and *Mr. Jackson.*

Among other references upon the part of the appellant were the following: 21 Am. & Eng. Ency. of Law (2d ed.) 461, 462; *Huset v. J. I. Case T. M. Co.* 120 Fed. 865; *Schubert v. J. R. Clark Co.* 49 Minn. 331, 51 N. W. 1103, 15 L. R. A. 818; *Watson v. Augusta B. Co.* 124 Ga. 121, 52 S. E. 152; *Bright v. Barnett & R. Co.* 88 Wis. 299, 60 N. W. 418, 26 L. R. A. 524; *Cameron v. Mount,* 86 Wis. 477, 56 N. W. 1094; *Anderson v. Smith,* 104 Minn. 40, 115 N. W. 743; *Thomas v. Winchester,* 6 N. Y. 397; *Norton v. Sewall,* 106 Mass. 143; *Bishop v. Weber,* 139 Mass. 411, 1 N. E. 154; *Elkins v. McKean,* 79 Pa. St. 493.

For the respondent *S. Heymann Company* there was a brief by *Williams & Williams,* and oral argument by *G. E. Williams.*

Among other references upon the part of the respondent *S. Heymann Company* were the following: *Akers v. Overbeck,* 18 Misc. 198, 41 N. Y. Supp. 382; *Sheffer v. Willoughby,* 163 Ill. 518, 45 N. E. 253; *Green v. Ashland W. Co.* 101 Wis. 258, 77 N. W. 722; *McQuaid v. Ross,* 85 Wis. 492, 55 N. W. 705.

For the respondent *Armour & Co.* there was a brief by *Thompsons, Pinkerton & Jackson,* and oral argument by *J. C. Thompson* and *C. D. Jackson.*

Among other references upon the part of the respondent *Armour & Co.* were the following: *Winterbottom v. Wright,* 10 M. & W. 109; *Huset v. J. I. Case T. M. Co.* 120 Fed. 865, 866; *Lewis v. Terry,* 111 Cal. 39, 43 Pac. 398, 31 L. R. A. 220; *Wellington v. Downer K. O. Co.* 104 Mass. 64; *Skinn v. Reutter,* 135 Mich. 57, 97 N. W. 152; *Savings Bank v. Ward,* 100 U. S. 195; *Peters v. Johnson,* 50 W. Va. 644, 41 S. E. 190, 57 L. R. A. 428; *Ives v. Welden,* 114 Iowa, 476, 87 N. W. 408, 54 L. R. A. 854; *Heaven v. Pender,* L. R. 11 Q. B. Div. 503; *Zieman v. Kieckhefer E. Mfg. Co.* 90 Wis. 497, 63 N. W. 1021; *Heizer v. Kingsland & D. Mfg. Co.* 110

Mo. 605, 19 S. W. 630, 15 L. R. A. 821; *O'Neill v. James*, 138 Mich. 567, 101 N. W. 828, 68 L. R. A. 342; *Losee v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638; *Loop v. Litchfield*, 42 N. Y. 351; *Nelson v. Armour P. Co.* 76 Ark. 352, 353, 90 S. W. 288; *Marvin S. Co. v. Ward*, 46 N. J. Law, 19; *McCaffrey v. Mossberg & G. Mfg. Co.* 23 R. I. 381, 50 Atl. 651; *Salmon v. Libby*, 114 Ill. App. 258; *Slattery v. Colgate*, 25 R. I. 220, 55 Atl. 639; *Goodlander M. Co. v. Standard O. Co.* 63 Fed. 400; *Standard O. Co. v. Murray*, 119 Fed. 572; *Lukens v. Freiund*, 27 Kan. 664.

TIMLIN, J. The complaint averred that the respondent *Armour & Co.* is a corporation of Illinois, licensed to do business in this state, and the respondent *S. Heymann Company* is a Wisconsin corporation. The former is engaged in the manufacture and sale throughout this state of toilet soap, and the latter is doing a mercantile business in the city of Oshkosh. *Armour & Co.* make and sell "Armour's & Co.'s Toilet Soap No. 175" as a harmless article for the purpose of use in cleaning the face, hands, and body, and hold out to the public that this soap would supply every need for all toilet purposes, and guarantee the purity and harmlessness thereof, and that the soap is free and clear from all harmful ingredients or foreign substances which might injure persons using the same in the ordinary manner. On and prior to September 20, 1906, *Armour & Co.*, its agents, servants, and employees, carelessly and negligently permitted and allowed a cake of the soap so manufactured by it to contain a needle or small round sharp piece of steel embedded therein. This made the use of said soap dangerous and was liable to cause injury to persons using the soap in the ordinary and usual manner. Some time prior to September 20, 1906, *Armour & Co.* sold and delivered to *S. Heymann Company* a quantity of this soap, in which was contained the defective piece or cake above described, in which the needle was so concealed as

not to be visible to the naked eye. This was purchased by the latter from the former to be sold by the latter to the general public and with the understanding that the soap was harmless and free from all dangerous particles or ingredients which might or which would injure the body of the person using the same for toilet purposes. Both defendants then jointly caused to be placed upon the market and sold to the general public this soap so negligently made containing this needle, and the plaintiff purchased from *S. Heymann Company* a quantity of this kind of soap and received the defective cake or piece above described. While properly using the soap so purchased for toilet purposes the plaintiff was injured by this needle in the soap entering the palm of his right hand and producing the most serious consequences, including paralysis and disability.

The pleader says this injury was sustained by reason of "want of ordinary care and prudence of the defendants, their agents, servants, and employees, in manufacturing said soap and putting the same on the market for sale for general use and allowing a sharp piece of needle or steel to become embedded therein which was liable to injure persons using the same in the ordinary and usual manner." Each of the defendants demurred: "(1) For that it appears . . . that several causes of action have been improperly united. (2) For that it appears . . . that the complaint does not state facts sufficient to constitute a cause of action against this defendant."

The pleader, appellant in this court, begins his brief with this statement: "This is an action in tort founded upon negligence alleged in the complaint, set forth at length in the printed case." In the face of this authoritative declaration of the purpose of the pleader we shall spend no time searching for any other or different intent on his part. The averments of the pleading are appropriate to such declaration.

Before we can determine whether or not two causes of ac-

tion are improperly united we must find the two causes of action and then ascertain whether they are such as may be joined. The complaint avers that both defendants "jointly caused to be placed on the market and to be sold to the general public *Armour & Co.'s* toilet soap so carelessly and negligently made containing said sharp round piece of steel or needle." But in the face of express averments in the same pleading that *Armour & Co.* manufactured the soap and negligently permitted a cake of soap so manufactured by it to contain this needle, that *Armour & Co.* sold and delivered to its codefendant quantities of its soap, including a box of soap containing this defective piece or cake of soap, and that the plaintiff purchased from *S. Heymann Company,* the last-quoted words must be considered a conclusion or inference of the pleader from the specific facts otherwise appearing in the complaint. So with the averment "that the purity and harmlessness [of the soap] was guaranteed by the said defendants and the same to be free and clear from all foreign substances which might injure the person using the same in the ordinary and usual manner." There being no purchase by the plaintiff from *Armour & Co.,* but the latter having sold to *S. Heymann Company,* and *S. Heymann Company* thereafter to the plaintiff, and no joint act of sale or contract by the defendants, and the plaintiff's claiming in tort, this averment must also be deemed a legal inference of the pleader from the facts stated, and it must be considered that the soap was offered to the public successively in the usual manner by each defendant as a harmless and useful toilet article, or that in each successive sale the vendor so represented the soap to his immediate purchaser.

The first inquiry, therefore, is whether the foregoing pleading states a cause of action for negligence. Negligence in law consists in the omission or inadvertently wrongful exercise of a duty, which omission or exercise is the legal cause of damage to another. This duty may by operation of law arise be-

tween persons who by contract bring themselves into certain relations, as bailor and bailee, carrier and passenger, master and servant, and others. Or the duty may be imposed independently of contract relations by statute, ordinance, or rule of the common law, and due only to particular persons or classes of persons, as users of a highway or other way, abutting owners, fellow travelers on the highway, and others. Or the duty may be due to all persons, as the duty to refrain from acts apparently dangerous to life or limb, as when in play "the fool casteth firebrands and arrows;" or where one exercises a conceded right in a manner apparently and unnecessarily dangerous. The duty is, not to never fail, but not to fail under such circumstances that a reasonably prudent person might infer injury, as a natural and ordinary consequence of such failure, to one to whom the duty is due. In each of these relations legal duty may vary in kind or in the degree of care required, or the act or omission may vary in the obviousness of its consequences, and therefore legal investigation, in order to judge of the quality of the act omitted or improperly performed, frequently inquires in what relation the parties to the action stood as to one another. This relation has been termed "privity," and in the law of negligence we find cases asserting and others denying this requirement of privity between the party injured and the party negligent. But with respect to the breach of a duty due from the defendant to all persons, it must be apparent that no such inquiry is relevant. A manufacturer, dealer, or other person may bring himself, however, into privity with others under exceptional circumstances, and thereby be charged with a duty toward such person different or greater than that which he owes to all persons, as in the case of a purchase by the vendee from the manufacturer or dealer for the use of a third person specially designated to the manufacturer or dealer, as in *George v. Skivington,* L. R. 5 Exch. 1, and *Woodward v. Miller,* 119 Ga. 618, 46 S. E. 847; and in the case of implied

invitation to servants of another master to use a defective appliance furnished to that master for the use of the latter and his servants, as in *Bright v. Barnett & R. Co.* 88 Wis. 299, 60 N. W. 418; *Coughtry v. Globe W. Co.* 56 N. Y. 124, and *Heaven v. Pender,* L. R. 11 Q. B. Div. 503; and in the case of a caterer furnishing a dinner for the use of the master of the feast and the guests of the latter, where one of the guests is injured by the negligence of the caterer in failing to properly prepare or select the food (*Bishop v. Weber,* 139 Mass. 411, 1 N. E. 154); and in the case of a manufacturer or vendor of remedies who sells to a dealer, but undertakes by directions or recommendations on or accompanying the package to communicate directly with the consumer or user (*Blood B. Co. v. Cooper,* 83 Ga. 457, 10 S. E. 118). But where the manufacturer or vendor had not at the time of the injury brought himself into any privity with the person injured within the rule of the foregoing cases or similar and analogous circumstances, the duty which the law imposes in favor of the user or consumer upon a manufacturer or dealer selling at wholesale to dealers generally, but not selling to consumers directly, is identical with the duty imposed by law on all persons with respect to the public generally. There is no privity, no particular relation carrying with it special duties or a special degree of care in such case. *Standard Oil Co. v. Murray,* 119 Fed. 572; *Salmon v. Libby,* 114 Ill. App. 258; *McCaffrey v. Mossberg & G. Mfg. Co.* 23 R. I. 381, 50 Atl. 651; *Bragdon v. Perkins C. Co.* 87 Fed. 109; *Zieman v. Kieckhefer E. Mfg. Co.* 90 Wis. 497, 63 N. W. 1021; *Loop v. Litchfield,* 42 N. Y. 351. The cases are collected in *Huset v. J. I. Case T. M. Co.* 120 Fed. 865, and the rule well stated from the viewpoint that no duty rests upon the manufacturer and seller to dealers in favor of the purchaser from the latter, with certain specified exceptions.

The manufacturer or dealer who puts out, sells, and delivers, without notice to others of its dangerous qualities, an

article which invites a certain use, and which article is not inherently dangerous, but which by reason of negligent construction he knows to be imminently dangerous to life or limb, or is manifestly and apparently dangerous when used as it is intended to be used, is liable to any person who suffers an injury therefrom, which injury might have been reasonably anticipated. So a manufacturer or vendor putting out and selling articles inherently dangerous, such as explosives or poisons, without notice to others of their dangerous nature or qualities, or with a misleading notice or negligently in any other way, is liable for any injury to any third person which might have been reasonably foreseen by the manufacturer or dealer in the exercise of ordinary care. So a manufacturer or vendor making and selling an article intended to preserve or affect human life is liable to third persons who sustain injury caused by his negligence in preparing, compounding, labeling, or directing the use of such articles, if such injury to others might have been reasonably foreseen in the exercise of ordinary care. The reason for these rules is apparent. The manufacturer or vendor should have no immunity from duties common to all merely because he is a manufacturer or vendor. At the same time there is in the common law no authority for imposing special duties upon him by reason of any privity between him and the vendee of his vendee, except in the instances mentioned, which may be regarded as occasions of a general duty toward the public to whom the wares are offered, or as exceptions to the rule of nonliability. If a general rule of statute or common law requires him to take precautions to protect the public against a dangerous substance by proper designation of the thing manufactured or sold, he owes a duty to the public so to do, and for failure in that regard he is liable for the consequences reasonably to be anticipated. In *Ives v. Welden,* 114 Iowa, 476, 87 N. W. 408, this duty was imposed by statute; in *Thomas v. Winchester,* 6 N. Y. 397, by common law.

We must assume upon this pleading that the needle was not

knowingly placed in the soap by the manufacturer, and that the soap was sold by the manufacturer to the dealer without knowledge that it contained this needle. There is in some sense an implied invitation to use the soap for toilet purposes, but no knowledge or reasonable means of knowledge from the ordinary composition of the product, or from anything brought to the notice of the manufacturer, that such use would be dangerous. A guaranty or warranty not knowingly false or fraudulent does not affect the liability in tort for negligence. The unintentional and negligent dropping of a needle into the mixture is a remote possibility, an extraordinary occurrence, and serious injury resulting from such act to persons using the soap for toilet purposes is an unusual and remote consequence of the careless dropping of such needle into the mixture. There are no doubt well-authenticated instances of severe illness and even death resulting from a puncture or scratch by a needle or a pin; but these are not ordinary consequences of such accidents, but are extraordinary and unusual consequences, which a person of ordinary prudence and discretion standing in this relation to the user or purchaser is not expected to foresee and provide against.

"Negligence in the law is not mere carelessness, but is careless conduct under such circumstances that an ordinarily prudent person would anticipate some injury to another as a reasonable and probable result thereof." *Johanson v. Webster Mfg. Co.* 139 Wis. 181, 120 N. W. 832.

Another definition is that "negligence consists in the failure to observe that degree of care which the law requires for the protection of the interests likely to be injuriously affected by the want of it." *Kendrick v. Towle,* 60 Mich. 363, 367, 27 N. W. 567; *Texas & P. R. Co. v. Bigham,* 90 Tex. 223, 38 S. W. 162; *Hope v. Fall Brook C. Co.* 3 App. Div. 70, 38 N. Y. Supp. 1040; Webb's Pollock, Torts (Am. ed.) 29, 30, and cases in notes.

There was therefore in the instant case no breach of a duty

imposed by law on the manufacturer for the protection of the public, or for the protection of the vendee of his vendee, no actionable negligence shown. Consequently the plaintiff has failed to state a cause of action against the defendant *Armour & Co.*

With reference to the *S. Heymann Company* there is no negligence charged in the complaint. The needle was so embedded in the soap as to be invisible to the naked eye. The *Heymann Company* did not know of its presence in the soap. In the exercise of ordinary care it could not have been ascertained that the needle was in the soap. This needle happened in the soap through no omission or default of theirs. They consequently are not holden to the plaintiff upon any ground of negligence.

By the Court.—The order sustaining the demurrer is affirmed.

DODGE and BARNES, JJ., dissent.

MCMILLAN, Appellant, vs. CITY OF FOND DU LAC, Respondent.

February 20—May 11, 1909.

Municipal corporations: Illegal contracts: Taxpayer's action: Paving contracts: Injunction.

1. A municipality upon hearing of official misconduct of a member of its common council relative to a street-paving contract, violative of sec. 4475, Stats. (1898), has power, and it is its duty, to refuse to consummate an executory contract therefor, and this power and duty a taxpayer may enforce.
2. An offer by the holder of an executory contract for street paving to furnish a construction company, bidding on other street improvements, material therefor at a less price than that quoted by manufacturers (even though such manufacturers have unlawfully combined to raise the price of such material), made

for the purpose of inducing a member of the common council, who was also interested in the construction company, to withdraw his official opposition to such executory contract, and carried out by concessions as to price, is within the condemnation of sec. 4475, Stats. (1898). The consent of the municipality to such executory contract, in part purchased by such concession, is unlawful and invalid, and a taxpayer may enjoin its execution.

3. To hold that such transaction is void only as between the holder of the executory contract and the construction company would be to make official immorality and consequent illegality a mere matter of judicial declamation. Nothing less than enjoining the execution of the executory contract is adequate to vindicate the law.

APPEAL from a judgment of the circuit court for Fond du Lac county: MARTIN L. LUECK, Judge. *Reversed.*

H. E. Swett, for the appellant, cited, among other cases, *Herman v. Oconto,* 100 Wis. 391, 76 N. W. 364; *S. C.* 110 Wis. 660, 86 N. W. 681; *Chippewa Valley & S. R. Co. v. C., St. P., M. & O. R. Co.* 75 Wis. 224, 44 N. W. 17; *Dean v. Charlton,* 23 Wis. 590; *United B. Church v. Vandusen,* 37 Wis. 54; *University v. People,* 99 U. S. 309; *New Orleans Waterworks Co. v. Rivers,* 115 U. S. 674, 6 Sup. Ct. 273; *Walla Walla v. Walla Walla W. Co.* 172 U. S. 1, 19 Sup. Ct. 77; *Fisk v. Jefferson P. J.* 116 U. S. 131, 6 Sup. Ct. 329; *Walston v. Nevin,* 128 U. S. 578, 9 Sup. Ct. 192; *Winnebago F. Mfg. Co. v. Fond du Lac Co.* 113 Wis. 72, 88 N. W. 1018; *Quayle v. Bayfield Co.* 114 Wis. 108, 89 N. W. 892; 1 Pom. Eq. Jur. § 260; 2 Pom. Eq. Jur. § 931.

M. K. Reilly, for the respondent, cited, besides other authorities, *Adams v. Beloit,* 105 Wis. 363, 81 N. W. 869; *Warner v. Knox,* 50 Wis. 429, 7 N. W. 372; *Boyd v. Milwaukee,* 92 Wis. 456, 66 N. W. 603; *Schintgen v. La Crosse,* 117 Wis. 158, 94 N. W. 84; *Washburn v. Oshkosh,* 60 Wis. 453, 19 N. W. 364; *Zwietusch v. Milwaukee,* 55 Wis. 369, 13 N. W. 227; *Cawker v. Central B. P. Co.* 133 Wis. 29, 113 N. W. 419; *Ballard v. Appleton,* 26 Wis. 67.

The following opinion was filed March 9, 1909:

TIMLIN, J. This action was brought by the plaintiff in his own behalf and in behalf of all others similarly situated for an injunction against the letting of a contract by the defendant city to the Barber Asphalt Paving Company. Plaintiff is a lotowner abutting on Park avenue, and it is also averred that plaintiff is a general taxpayer in the defendant city and that the paving of crossings is required to be paid for by the city, and that one of the aldermen of said city was interested in other paving contracts requiring brick pavement, and between this alderman and the Barber Asphalt Paving Company there existed a secret and corrupt agreement for the purpose of eliminating competition and securing all the contracts for paving to be let by the city, the profits thereon to be divided between the alderman and the Barber Asphalt Paving Company. The complaint contains other averments not necessary to be noticed on this appeal. The circuit court made findings of fact with great detail, and such findings are challenged on this appeal as not supported by the evidence.

The twenty-third finding of fact is as follows:

"That there is no evidence that any alderman, or any official of said city, has been promised or received from the Barber Asphalt Paving Company, or from any person, any rebate or money or corrupt consideration whatever for his action, or his vote, or his influence, in any of the matters or proceedings taken by the said city, or by the council or by any officer thereof, in and about the proposed paving of Park avenue with asphalt, and about the paving of any street of said defendant city with asphalt."

The twenty-fourth finding of fact is as follows:

"That there is no evidence that there was any secret or corrupt, or any, agreement between the Barber Asphalt Paving Company and the said Dockery mentioned in the complaint for the purpose of eliminating or avoiding competition, or for the purpose of securing all, or any, of the contracts for paving

to be laid by said defendant city, or in relation to any matter, fact, or thing concerned or relating to the proposed paving of Park avenue with asphalt or relating to the paving, or proposed paving, of any street in said defendant city."

The twenty-eighth finding is as follows:

"That the plaintiff has wholly failed to prove any of the material allegations set out in the complaint not admitted by the answer, and has wholly failed to show any fraud or corruption in, about, or relating to the proceeding for paving Park avenue with asphalt as set out in the complaint."

Nevertheless the uncontroverted evidence shows that one Dockery was a member of the board of aldermen during the year 1906 and until he resigned on August 20, 1907, and was in 1907 president of the council. In May, 1907, Mr. Dockery, with Michael McCugo and William H. Bruett, organized a corporation called the McCugo Construction Company, with an authorized capital of $25,000, each taking one third of the stock issued, and this stock was paid for by each putting in $700 in cash and transferring to the company contractors' equipment, consisting of concrete mixers, shovels, wheelbarrows, and utensils of that kind. A large amount of street improvement was then under consideration by the common council, but not fully decided upon.

The Barber Asphalt Paving Company was a corporation, and had a local agent at *Fond du Lac,* one Gavin. On June 5, 1907, the common council adopted a resolution declaring it to be the purpose of the council that Park avenue and Fourth street to Merrill street be improved at the expense of the property to be benefited thereby, by grading the roadway thereof to the established grade, and by constructing thereon an asphalt pavement under five years' guaranty, together with a Portland cement concrete combined curb and gutter, and directed the board of public works to view the premises and consider and determine the various matters and perform the various duties in said resolution specified. The board of public works, on June 20, 1907, reported that they had, among other

things, caused plans, profiles, and specifications for said contemplated improvement to be prepared and filed and that the entire cost of such work would be $25,027.67. They reported the parcels of real estate benefited by the contemplated work and the amount to be assessed for benefits. On July 2, 1907, the board of public works reported to the common council that notice of such assessment had been given and an opportunity for hearing, as required by the charter, and thereafter bids were called for and the matter of letting this contract was pending. The Barber Asphalt Paving Company was a bidder or prospective bidder upon said contract. On July 11, 1907, the city called for bids upon another contract for the paving of part of Main and Third streets with brick pavement, overlying a concrete base therein described, these bids to be received up to August 12, 1907. On August 12, 1907, Michael McCugo bid on this work, offering to make a brick pavement with five-inch concrete foundation for $2.23 per square yard, and the same on a six-inch concrete foundation for $2.26 per square yard. He did not specify what kind of paving brick he would use. There was a competitive bid by J. Rasmussen & Sons Co. on this same work, with a five-inch concrete foundation and Douville brick at $2.33 per square yard, with Purington brick $2.34 per square yard, and with Metropolitan brick $2.39 per square yard.

It appears by the oral evidence that in June, 1907, McCugo had a bid also for other contract work on Gillett street. McCugo informed Dockery that he was going to bid on Gillett street, and asked Dockery to go into the deal because a member of the McCugo Construction Company, but Dockery informed him that being a member of the council he could not participate in any contracts that were to be let by the city, and absolutely refused to do it. While Dockery was temporarily absent from the city of *Fond du Lac* McCugo put in a bid for this work on Gillett street in his own name, and the contract was awarded to him by the council before Dockery

returned. McCugo also bid upon the work for paving Fourth street, and Dockery was somewhat active in the matter, but to what extent is not very definitely shown. The brick which was to be used in paving under this contract for paving Main and Third streets was purchased from the Barber Asphalt Paving Company. Dockery was asked and answered as follows:

"*Q.* Who made the contract for the brick? *A.* The contract was originally—the contract was made financially by the McCugo Construction Company. *Q.* The brick contract? *A.* Yes. *Q.* Who furnished the brick for Third street? Was that in the same contract? *A.* Yes."

Where a street was to be paved partially by asphalt paving and partially by brick paving and all let together in one contract, as was the case on Park avenue and Fourth street, being the contract in question, the McCugo Construction Company could not bid on it or compete with the Barber Asphalt Paving Company, but the Barber Asphalt Paving Company could bid on it because they handled both kinds of work. The witness testified that he made no arrangement with the Barber Asphalt Paving Company that he was to have a share in the work that was being done or to be done in the city of *Fond du Lac.* And further:

"*Q.* When you made your bid for the brick work, did you experience difficulty in buying or purchasing brick that could fill the desired specifications? Didn't all the brick dealers refuse to deal with you? *A.* Yes, all except the Barber Asphalt Paving Company. They tried to hold us up. I want to explain that to the court."

The explanation of Mr. Dockery is that, having found the sellers of paving brick apparently in combination to hold up the price, which fact he ascertained from letters written by him in the name of the McCugo Construction Company, he went to Mr. Gavin, the agent of the Barber Asphalt Paving Company at *Fond du Lac,* and told him he had these letters from the different manufacturers, and that unless the price of

brick was reduced he would, in the interests of the citizens of *Fond du Lac* and of the public, have or attempt to have the bids for asphalt paving rejected in the common council, whereupon the Barber Asphalt Paving Company gave a price on brick independent of the combine, making a reduction of $7 per thousand, and that was what the property owners made on these two streets. They made $6,000 by compelling the combine to make a different price on brick. Mr. Dockery testifies he was promoting the best interests of the city of *Fond du Lac* and they got the benefit, and that he did it for the best interests of the city, regardless of what some of the members may think about it, and if we accept his conclusion or statement of his motives his purposes were good. He further testifies: "We could not have done any bidding on the street unless they gave us a price on the brick." And, speaking of the McCugo contract for brick paving, he testifies: "*Q.* Was the reduction made before the contract was made for the brick paving? *A.* Why, yes; we could not make the contract unless we had the price to govern it." He further testified that at the time when McCugo got that price on brick he was in the council, but had nothing to do with the contract. He was president of the council while this negotiation was going on between McCugo and the Asphalt Paving Company for the reduced price of brick. He conducted the negotiations himself for the best interests of the city, and threatened Mr. Gavin that unless they broke away from the trust and gave the contractors the benefit of the correct price on brick he would take the letters that he had received from the different manufacturers in the country and have them read to the council and published in the newspapers, and find out whether they organized a brick trust to the detriment of the city of *Fond du Lac* or not. He had written several letters to the representatives of the Asphalt Paving Company at Des Moines, Iowa, where they had their brick manufacturing plant, called the Capital City Brick Company, during these

negotiations, and he repeats, when examined by the attorneys for the defendant, that at the request of McCugo, who told him it was impossible to get any price on brick, he took the matter up in the name of the McCugo Construction Company, got the names of all the manufacturers, wrote to them, asking them for cash prices on brick, and then saw Mr. Gavin and threatened him that he should use his influence in the council to have their bid rejected if the price of brick remained. He understood that the price fixed between the contractors and manufacturers was $2.56 per yard for the brick on Third and Fourth streets, and having the interest of the city at heart, and not to go into the contracting business himself, because he did not want it, but was a member of the council, he did everything possible to promote the best interests of the city of *Fond du Lac,* and in doing that some people put a wrong construction on it. The Barber Asphalt Paving Company reduced their price from $27.50 per thousand to $20.50 per thousand for paving brick, and McCugo put in a bid of $2.23 and $2.26 per yard. Mr. Dockery brought in a resolution to the common council to change the mode of street paving on Park avenue from asphalt to macadam pavement, and this resolution is in evidence. It appears to have been filed July 3, 1907, was signed and offered by Dockery, and read as follows:

"Resolved by the mayor and common council of the city of *Fond du Lac,* that the petition of the property owners of property abutting on Park avenue between Merrill and Fourth streets presented herewith be granted, and that the proceedings heretofore had and taken toward paving the same with asphalt be and they are hereby vacated and set aside and made null and void."

This resolution was carried. On July 11, 1907, a resolution was presented rescinding this resolution above quoted, and this was carried, and Mr. Dockery informs us that he voted against the passage of the last-mentioned resolution, but his vote was not necessary, and he had secured the reduction upon the price of brick.

To sum up the testimony of this witness, it is to the effect that with the best of motives and for the common good, while a member of the common council and a member of the construction company, another member of which was bidding on municipal contracts for brick paving, he threatened the Barber Asphalt Paving Company to use his official power, vote, and influence against them in rejecting their pending contract, or the contract in question, unless they would make a reduction on the price of brick, in which article they were dealing. They made this reduction at his request and in name to his construction company and he discontinued his opposition, permitted the resolution, which he introduced and voted for to effectuate his threat, to be rescinded, and then, after his associate McCugo had gotten the contract for brick paving at the price named per square yard, McCugo turned the contract over to the construction company, and Dockery resigned from the council and became actively and pecuniarily interested in the contract. He also testified that the former contract on Gillett street, taken in June under the name of Michael McCugo, was carried on in such a way that he (Dockery) drew the checks for disbursements under the name of the McCugo Construction Company, but he had nothing to do with McCugo, and he explains it as follows:

"Mr. McCugo was interested in the McCugo Construction Company, had his own capital all tied up there, and through an agreement to buy his material we had contracted for a very large amount of cement, which we had to use, and he was paying a profit on the cement and also a profit on the stone to the McCugo Construction Company, and I was aiding him financially to carry out the deal as I would aid anybody else."

He also answered: "I assumed the financing of the McCugo Construction Company long before I resigned from the council—from the time of its organization." We have quoted from this testimony at length for the purpose of showing the exact words of the witness in the particulars covered thereby.

McCugo, sworn as a witness, testified that he took the contract on Gillett and Green streets in his own name, that the

McCugo Construction Company assisted him by giving him its credit, and that the checks were drawn in the name of that company by Dockery, the bookkeeper, who wrote the checks, and signed by Mr. Dockery and Mr. McCugo, and that Dockery helped in financing the building of Gillett, Green, Third, and Fourth streets. He (McCugo) did not attend to the bargaining for the brick for Third and Fourth streets with the Barber Asphalt Paving Company, but he did attend to the bargaining in the sense of buying or making the contract or signing the contract. Dockery assisted him a great deal in getting prices on brick. McCugo was never able to get a price on brick before. McCugo got this reduced price on brick before putting in his bid for brick paving.

It requires an extraordinary stretch of credulity to find the McCugo Construction Company was not interested in this brick paving contract or that Dockery was getting this reduction on the price of brick for the benefit of the public. And the figures tend strongly to show that the public did not get the benefit of it, because, having gotten this reduction of $7 per thousand on paving brick, Mr. McCugo's bid was at the rate of $2.23 or $2.26 per square yard, depending upon whether he supplied five-inch or six-inch concrete base, and not specifying the kind of brick, while the bid of Rasmussen & Sons Co. was $2.34 per square yard for brick pavement with six-inch concrete foundation and Purington brick, and $2.34 per square yard for brick pavement with five-inch concrete foundation and Purington brick, with slightly lower prices for Douville brick and slightly higher for Metropolitan brick. This was a difference of eleven cents per square yard in favor of McCugo's bid, and in order that the city may be said to have benefit of $7 per thousand reduction upon the price of brick, a thousand of brick would have to pave sixty-three and a fraction square yards, and even at the price mentioned by Dockery as that of the combination before he secured the reduction, namely, $2.56 per square yard, McCugo's

lowest bid offered an advantage of only thirty-three cents per square yard, and 1,000 brick must cover twenty-one and a fraction square yards of street before it could be said that the city got the benefit of the reduction even from the price said by Dockery to be the price fixed by some combination.

We think the argumentative conclusions of Dockery have little weight against the undisputed facts. In the foregoing summary we have presented the facts as elicited from Dockery, with his statements of motives and his opinions and conclusions. But, taking the case exactly as claimed by Dockery, it is as follows: An alderman of the city, after resolutions are passed, proceedings under way, and bids called for the paving of a street with asphalt, approaches a bidder, who is also a dealer in brick, informs that bidder that unless he makes a reduction upon the price of brick the alderman will use his influence to prevent letting of the asphalt contract. The alderman then introduces a resolution rescinding the action already taken by the council and changing the proposed pavement from asphalt to macadam pavement. This alderman is interested as a stockholder in a corporation organized for the purpose of doing street and other construction work. Another member of that corporation contemplates bidding upon other city paving contracts for brick paving of streets and is engaged in street contract work. The construction corporation in which both are interested pays out the money on the existing contracts of the alderman's associate. The alderman is financing this corporation, helping it and signing its checks, but the existing contracts are not in its name. The Barber Asphalt Paving Company, prospective bidder on the asphalt contract, makes a concession of $7 per thousand to the alderman at his request and upon his threat to use his influence against the letting of contracts for asphalt paving. McCugo, the associate of the alderman, avails himself of this reduction, signs a contract with the Asphalt Paving Company for the purchase of brick, procures the brick paving contract,

and the alderman withdraws his opposition to the letting of the asphalt contract, and the city now proposes to let the contract for paving with asphalt to the Barber Asphalt Paving Company. The alderman then resigns his office, the contracts for brick paving are turned over to the construction company, and he takes charge of the work and shares in the profits. Assume in addition to the foregoing, in deference to the findings of the court below, that the alderman was actuated only by pure motives in the foregoing transaction. A statute in this state provides:

"Any person who shall corruptly give, offer or promise to any . . . officer . . . of any . . . city . . . any gift or gratuity, or any money, goods, thing in action, personal or real property, or anything of value, or any pecuniary or other personal advantage, present or prospective, with intent to influence his vote, opinion, judgment or action upon any question, matter, cause or proceeding which may then be pending or which may by law come or be brought before him in his official capacity, . . . shall be punished by imprisonment in the state prison not more than five years nor less than one year, or by fine not exceeding one thousand dollars, nor less than two hundred dollars." Sec. 4475, Stats. (1898).

If the reduction upon the price of brick made by the Barber Asphalt Paving Company at the request of Dockery was anything of value or any pecuniary or personal advantage present or prospective, it would seem that the transaction above detailed was within the letter and spirit of this statute. The question then arises whether the city, upon learning of the facts, should have rejected the bid of the Barber Asphalt Paving Company and refused to contract with it. If the city had this power and duty the taxpayer may enforce it.

In *State ex rel. Wildman v. Kidd,* 63 Wis. 337, 23 N. W. 703, it appeared that the town board of supervisors, being called upon to divide a school district and form therefrom a new school district, met for that purpose and refused to consent to the division unless the new school district should re-

linquish all claim to the division of property between it and the old district, and that in order to obtain the passage of the resolution creating the new school district that district did consent to surrender all claim to a division of the school property. The new district was formed, but brought *mandamus* to repudiate this claim and compel a division. The court, in passing upon the regularity of the action of the supervisors, said:

"In deciding upon the question of division the town board had no right to be actuated by any motive or consideration other than for the public good. If such division would, in their judgment, be for the public welfare, then they had no moral right to exact a pecuniary consideration from one district to the other as a condition of making it. . . . It is the policy of the law that all who are active in opposition to such division, whether members of the school board or otherwise, as well as all who are active in trying to procure such division, shall act in good faith; and any agreement to combine in opposition to such division, or consent thereto, in consideration of money to be paid, or property or rights of property to be surrendered, is contrary to public policy and therefore void."

The court cites *Howard v. First Ind. Church,* 18 Md. 451, where a contract promising to pay an abutting owner for signing a petition to pave a street by reimbursing him the cost over $1.15 per front foot was criticised and its invalidity suggested; *Maguire v. Smock,* 42 Ind. 1, 13 Am. Rep. 353, where a contract to pay certain abutting owners a sum of money provided they petition the city for a paving improvement was adjudged illegal; *Ohio L. I. & T. Co. v. Merchants' I. & T. Co.* 11 Humph. 1, 53 Am. Dec. 742, and other cases. See, also, *New Haven v. N. H. & D. R. Co.* 62 Conn. 252, 25 Atl. 316, where the contract was made at the request of and for the protection of property holders, and it was said:

"That a public officer should regulate his official conduct by considerations of private benefit to himself or to others can never, as we trust, receive the sanction, either express or tacit, of this court."

In *Doane v. Chicago City R. Co.* 160 Ill. 22, 45 N. E. 507, it was decided that a contract whereby a street railway company purchased the consent of an abutting property owner to laying down of a street railway in the street in front of his property was illegal and void. This was because the common council was authorized by statute to base its legislative action upon consent of a certain number of abutting owners.

In *Shelby v. Miller,* 114 Wis. 660, 91 N. W. 86, an action was brought on a contract made with the supervisors of the plaintiff town to indemnify the town against the expense of litigation in consideration of being permitted to carry on a litigation for the town relative to the opening of a highway. The contract was held to be illegal and void.

In *State ex rel. Dosch v. Ryan,* 127 Wis. 599, 106 N. W. 1093, the town board of supervisors refused to alter a highway. An appeal was taken to commissioners appointed by the county judge as authorized by statute. The commissioners hesitated about overruling the decision of the supervisors, whereupon one of the parties petitioning for the alteration executed and gave to the commissioners a bond in the sum of $1,000 running to the town, binding himself to build the road and bridge made necessary by such alteration on or before a date therein fixed, and thereupon the commissioners unanimously decided to alter the road as petitioned for and filed their written decision to that effect. The supervisors refused to lay out the road pursuant to that decision, and upon *mandamus* to compel them so to do the trial court found as matter of fact that the majority of the commissioners were not influenced in their action by the agreement and bond and that their decision was in all respects valid, and awarded the peremptory writ of *mandamus.* The judgment was reversed in this court and the writ quashed. The court said:

"Highways are only to be laid out when the public good will thereby be promoted. Private considerations or inducement cannot rightly enter into the question in any degree. If private individuals with special interests were allowed to bargain with public officers who are exercising this important

and sovereign power, and to offer inducements of any kind tending to influence their free action, the interests of the public would be at once in jeopardy. Not only are such bargains void as against public policy, but official action based thereon ceases to be based solely upon the public welfare, and becomes tainted with some degree of private interest. . . . The decision is conclusively shown to have been, in part, based upon the fact that the bond had been given. No nice separation of motives is possible. There is safety only in the entire prohibition of such transactions."

This goes a little further than *State ex rel. Curtis v. Geneva,* 107 Wis. 1, 82 N. W. 550, but it is to be observed that in the last-mentioned case the contract to contribute money toward the construction of the road was made after the decision of the commissioners and was found not to have induced or procured that decision. See, also, *State ex rel. Newell v. Purdy,* 36 Wis. 213, and *Chippewa Valley & S. R. Co. v. C., St. P., M. & O. R. Co.* 75 Wis. 224, 44 N. W. 17. In the last-named case one railroad corporation agreed with another to refrain from making any effort to procure a land grant from the legislature and to render to the other reasonable and proper assistance in procuring such grant in consideration of receiving from the latter a portion of the land granted, and the contract was held void.

The following language is cited with approval from *Clippinger v. Hepbaugh,* 5 Watts & S. 315:

"It matters not that nothing improper was done or was expected to be done by the plaintiff. It is enough that such is the tendency of the contract; that it is contrary to sound morality and public policy, leading necessarily, in the hands of designing and corrupt men, to improper tampering with members, and the use of an extraneous secret influence over an important branch of the government. It may not corrupt all; but if it corrupts or tends to corrupt some, or if it deceives or tends to deceive or mislead some, that is sufficient to stamp its character with the seal of reprobation before a judicial tribunal." See, also, *Oscanyan v. Arms Co.* 103 U. S. 261, 264; *Hayward v. Nordberg Mfg. Co.* 85 Fed. 4, 29 C. C. A. 438, and cases in note.

In *Pingry v. Washburn,* 1 Aik. (Vt.) 264, it was held that an agreement on the part of the corporation to grant to individuals certain privileges in consideration that they should withdraw their opposition to the passage of a legislative act touching the interests of the corporation was against sound policy, prejudicial to correct and just legislation, and therefore void. *Smith v. Applegate,* 23 N. J. Law, 352. See *Washington Irr. Co. v. Krutz,* 119 Fed. 279, 56 C. C. A. 1, and cases in note. In the last-mentioned case the corporation offered to convey certain land to the register of a land office in consideration of services rendered by him concerning certain lands in controversy before the department. The officer declined to accept the land while an officer, but offered to do so after his term expired, provided the company would give him some work to do as payment for the land. After the expiration of his term he rendered some nominal service to the corporation, whereupon the same offer was renewed and accepted. But the court considered the transaction so blended with the former offer and conditional acceptance as to constitute a single transaction, void as against public policy.

The offer of the Barber Asphalt Paving Company to the McCugo Construction Company, made for the purpose of inducing Dockery to withdraw his opposition as a member of the council to their contract with the city, and carried out by concession to the McCugo Construction Company or to McCugo, was within the condemnation of the foregoing authorities. The consent of the city, in part purchased by this concession, was unlawful and invalid. It is possible that if the contract between the city and the Barber Asphalt Paving Company was executed and performed the courts would not aid in setting it aside or annulling it, but in an action like this, brought to enjoin *in limine* the making or entering into by the city of a contract so procured, the law is otherwise. If the city, being informed of the manner in which the Barber Asphalt Paving Company procured the withdrawal of op-

position to this contract, refused to recognize its illegality and proposed to reward the company's turpitude in the matter by giving it a contract so obtained, the plaintiff taxpayer of the city and a party affected by this contract may enjoin its execution. No less than this is adequate to vindicate the law. To hold the transaction void only so far as it affects the agreement between the Barber Asphalt Paving Company and the McCugo Construction Company is to make official immorality and consequent illegality a mere matter of judicial declamation attended by no more serious consequences than a lecture from the bench. *State ex rel. Dosch v. Ryan,* 127 Wis. 599, 106 N. W. 1093; Greenhood, Pub. Pol. 308, 309; *People v. Stephens,* 71 N. Y. 527; *Land, L. & L. Co. v. McIntyre,* 100 Wis. 245, 75 N. W. 964.

It is urged, apparently in extenuation of the acts of Dockery, that there was an unlawful combination for the purpose of raising the price of paving brick and thereby extorting from the city or the abutting owners large sums of money. The foundation for this claim is in some argumentative conclusions of Dockery. But even if such illegal combination existed there are other remedies and other ways of meeting it than by illegal countermoves on the part of the alderman and the bidder. Regarding the nature of the action and the necessity which the plaintiff was laboring under of procuring his evidence from the mouths of those adversely interested, the rulings of the court below were quite erroneous and illiberal, but it is not necessary to review them in detail. The judgment of the court below should be reversed, and the cause remanded with directions to enjoin the execution of the proposed contract on the part of the city.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to enter judgment for the plaintiff.

Upon a motion for a rehearing there was a brief for the appellant by *H. E. Swett,* and separate briefs for the respond-

ent by *M. K. Reilly,* attorney, and *Frank M. Hoyt,* of counsel.

The motion was denied May 11, 1909.

MUELLER, Appellant, vs. BURTON and another, Respondents.

March 11—May 11, 1909.

Building contracts: Incomplete performance: Necessity of showing value on substantial performance.

Where substantial performance of a contract to furnish and install a boiler for heating according to specifications is shown, the contractor seeking to recover need not produce evidence tending to show the reasonable value of the boiler installed. TIMLIN and BARNES, JJ., dissent.

***Per* WINSLOW, C. J., *concurring:* Substantial performance means strict performance in all essentials necessary to the full accomplishment of the purposes for which the thing contracted for was designed.**

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Richmond, Jackman & Swansen,* and oral argument by *S. T. Swansen.*

Wm. R. Bagley, for the respondents.

TIMLIN, J. The appellant brought an action against the respondents to recover upon express contract of the tenor and effect following:

"*Mrs. L. B. Burton, Madison, Wis.*

"DEAR MADAM: We propose to furnish a 48″ Dia. by 12 ft. long Horizontal Tubular Boiler built in conformity with the attached specifications. This boiler to be installed and connected with the present pipe work and be inclosed in a suitable brick setting of common brick wall to be of proper size to suit the conditions which surround this installation due to the limited space allowed for same, all walls directly exposed to the fire to be lined four-inch lining of fire brick.

The present old 25 H. P. boiler to be removed, and a 48″ by 12 ft. to take its place, new breeching to be furnished and erected. The entire work complete for the sum of eleven hundred fifty dollars ($1,150).

"Yours very truly,

"THE MUELLER CO.,

"per H. Toussaint, Mgr."

The specifications referred to contain the following:

"Thickness: The thickness of boiler shell sheets will be 9-32 of an inch, boiler heads 7-16 of an inch. Dome shell sheets 5-16 of an inch, dome head 3-8 of an inch. . . . Have the dome opening for the water column tap 1¼ in the front head not on the side. Boiler to be built for a working pressure of 100 pounds."

This offer was accepted in writing on October 9, 1907. The court found that the plaintiff installed the boiler under this contract, but the boiler did not comply with the specifications, in that the shell sheets were not 9-32 of an inch in thickness; the side sheets in the smoke box were from .241 to .246 of an inch thick, while such sheets above the dome opening were from .253 to .256 of an inch thick. The boiler so installed has a working capacity of from ten to twenty pounds steam less than the one required by the contract, its bursting point is from forty to eighty pounds lower than that specified, and it is not in substantial compliance with the requirements of the contract. The boiler was installed in the Capital House during December and January. Defendants had no other boiler in this hotel of sufficient capacity to supply the steam necessary to operate the hotel and were of necessity obliged to use the boiler after it was installed. Discovering that the boiler did not comply with the specifications, they notified the plaintiff, who promised to make the boiler right if it did not so comply. Frequent conferences and negotiations were had, and while these were in progress, on demand of the plaintiff, the defendants made partial payments on the contract amounting in all to $600, in reliance upon the promise of the plaintiff to make the boiler comply with the specifications; but the

defendants never accepted the boiler, nor did they rescind the contract or tender back to the plaintiff the boiler.

No testimony was offered by either the plaintiff or defendants from which the court could compute any abatement from the contract price of the boiler, the plaintiff standing upon a claim to recover the whole contract price, and the defendants standing upon a claim to defeat recovery of this contract price because there was no performance. The plaintiff assumed the affirmative and offered evidence of measurements of the thickness of the boiler shell by means of a micrometer, as follows: At the edge of the plate to the smoke-box extension, four measurements finding the plates or shells near the edge and in this smoke box .241, .246, .246, and .243 of an inch, respectively. In the same way at the dome five measurements were taken, as follows: .260, .261, .255, .256, and .253 of an inch, respectively. The boiler was then complete and the micrometer could only be used on projecting edges. The thickness required by the specifications expressed in decimals of an inch, for more convenient comparison, was: Shell sheets .281 plus; heads .437 plus; and dome .312 plus. It was left to inference and argument whether or not the thickness of the plates near their edges and in the smoke box might be assumed to be the thickness of the shell plates forming the body of the boiler. There was no evidence of the thickness of the boiler-head plates, and the dome plates varied as above indicated from the specifications.

Expert evidence was received relative to the lower efficiency and bursting strength of the boiler as constructed, and also that the boiler would cost annually a larger sum for boiler insurance than it would cost if constructed according to the specifications, that it was constructed fit for a working pressure of 100 pounds as required by the specifications, and that it was of sufficient capacity to meet the present needs of the purchasers, although not to meet future anticipated enlargements or requirements, with a view to which the boiler was

purchased. There was contradictory evidence, but not as to measurements or extra cost of insurance. There was evidence tending to show, and a finding of the court to the effect, that the specification relating to 100 pounds pressure was added without authority of defendants after the execution of the contract. There is testimony that the difference in market value of the sheets of the thickness shown by the measurements and those shown by the specifications is about $3 a sheet, but there is no evidence to show how many sheets are used up in making the boiler.

Upon the facts proven a majority of this court are of opinion that there was substantial performance shown, and that the findings of the court to the contrary are against the great weight of the evidence, and also that the contractor seeking to recover need not produce evidence tending to show the reasonable value of his incomplete but substantial performance. The writer does not share that belief, but is inclined to the view that the findings are supported by evidence, and that this court has carried the rule relative to substantial performance in this case too far, so as to seriously embarrass persons in the making of contracts and in protecting themselves against petty overreaching by contractors, and that, following the New York cases, it has gone beyond them in imposing upon the party resisting payment for lack of performance the onus of proving how much the concededly imperfect performance was worth to him. See *Manning v. School Dist.* 124 Wis. 84, 100, 102 N. W. 356; *Manitowoc S. B. Works v. Manitowoc G. Co.* 120 Wis. 1, 97 N. W. 515.

In *Spence v. Ham,* 163 N. Y. 220, 57 N. E. 412, it is said that when the plaintiff "shows that he performed his contract, except that through inadvertence he omitted to do some unsubstantial things, he is not entitled to recover anything until he shows that the things omitted, if worthy of any attention whatever, can be supplied for a comparatively small sum, in which event he can recover the contract price after deducting

that sum." Until expounded by the present decision, I understood *Manning v. School Dist., supra,* to lay down the same rule.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to enter judgment for the appellant.

BARNES, J., dissents.

The following opinion was filed June 3, 1909:

WINSLOW, C. J. (*concurring*). Accepting as conclusive the finding of the trial judge to the effect that the contract, when executed, did not contain the words "boiler to be built for a working pressure of 100 pounds," there is really little dispute in the facts.

The respondents desired a new boiler to take the place of one that had been disabled, and contracted with the plaintiff to furnish and install the same, with the specification that the thickness of the boiler plates was to be 9-32 of an inch. The plaintiff contracted with a reputable manufacturer for the making of the boiler, who in turn purchased the necessary sheets of steel from reputable makers of boiler plate. The plate furnished was marked as 9-32 of an inch in thickness, and the boiler was made with the idea on the part of all concerned that the sheets were of the required thickness. Acting under this belief, the boiler was installed and partially paid for. It was afterwards found, however, that the boiler plates were only a trifle over 8-32 of an inch in thickness. The actual difference in thickness in those parts of the boiler subjected to steam strain was 28-1000 of an inch. This boiler would carry a working pressure of 109 pounds and a bursting pressure of 436 pounds, while a boiler with a 9-32 inch shell would carry a working pressure of 118 or 120 pounds and a bursting pressure of 472 to 480 pounds. The boiler in

question was tested by submitting it to a hydrostatic pressure of 150 pounds and found perfect. It will last just as long as the other. It costs just as much to manufacture, except that there would be about $3 difference in the cost of necessary plate. It was to run in connection with another boiler, and was required to carry but from 80 to 100 pounds of steam in order to furnish all the steam ever required by the defendants in their business. I find no evidence that any extension or enlargement of the defendants' business was anticipated when the boiler was bought. Certainly no such intention was communicated to the plaintiff.

Under these circumstances I agree that there was a substantial performance of the contract. There was a good-faith attempt to furnish the exact boiler contracted for. Without fault on plaintiff's part the shell was 28-1000 of an inch thinner than the contract called for, but the boiler answered every purpose for which it was purchased, was just as durable, and the difference in value was only nominal. "Substantial performance means strict performance in all essentials necessary to the full accomplishment of the purposes for which the thing contracted for was designed." *Manning v. School Dist.* 124 Wis. 84, 102 N. W. 356. It seems to me that there was just that situation here without dispute, and hence the plaintiff was entitled to judgment.

FLANDERS, Respondent, vs. WASHBURN LAND COMPANY, Appellant.

April 20—May 11, 1909.

Tax titles: Quieting title of owner: Limitation of actions: "Vacant or unoccupied:" Necessity of payment or tender of taxes paid by tax-title claimant.

1. Where a tract of 120 acres of timber land was surveyed, stakes set at the corners, and the boundaries blazed on trees, one forty having on it a small clearing and farm buildings, occupation of the house from time to time while engaged in growing and harvesting crops and removing timber, leaving furniture in the house and hay in the barn when away, together with occasional passing over the whole tract to guard against trespass and fires, warrant a finding that the land was not vacant and unoccupied within the meaning of sec. 1187, Stats. (1898), providing for constructive possession under recorded tax deeds.
2. Constructive possession under a recorded tax deed only ripens into an absolute title where the lands remain vacant and unoccupied continuously during the whole period named in the statute.
3. Sec. 1190, Stats. (1898), defining what shall constitute "possession" within the meaning of the preceding sections, relates to the meaning of that word in secs. 1187 and 1189, rather than to the meaning of the words "vacant and unoccupied."
4. Where the statute of limitations has divested the title of the tax-deed claimant, in an action to quiet title the original owner is not required, as a condition of recovery, to tender or pay any part of the taxes.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

A. W. McLeod, for the appellant.

W. W. Downs and *E. C. Alvord,* for the respondent.

TIMLIN, J. The respondent, grantee of John Carroll, who held under a homestead patent from the United States dated July 18, 1898, began this suit against the appellant to quiet title to the north half of the southwest quarter of

section 20, township 50 north, of range 5 west, after May, 1905. The appellant claimed this land under tax deed for the delinquent taxes of 1898 issued and dated May 20, 1902, and recorded May 21, 1902, in the office of the register of deeds of Bayfield county, in which county the land lies.

Respondent comes to this court with judgment of the court below in his favor, based on the finding that, during the three years next succeeding the recording of appellant's tax deed, he and his grantor, John Carroll, were in possession of the land in question. It is contended that this finding is unsupported by the evidence. But it appeared that John Carroll on May 31, 1898, made the usual proof of occupancy as a homestead necessary to obtain a patent from the United States for the land in question, together with another eighty-acre tract adjoining it, and thereafter granted away one forty-acre tract of this quarter-section, leaving him with the eighty acres in question and the northwest quarter of the southeast quarter of said section 20 adjoining the land in question on the east of the latter. Upon the northwest quarter of the southeast quarter Carroll had at the time patent was issued and theretofore his homestead, a log dwelling eighteen by thirty feet, a log barn sixteen by eighteen feet, a hay shed fourteen by sixteen feet, and a clearing of four or five acres. He had the 120 acres surveyed, stakes set at the corners, and the boundaries "blazed on trees." He had a team of horses on the land, lived in this house and farmed the small clearing, and used the adjoining land in question here for taking off shingle, timber, fence rails, wood, and cedar, and he continued this residence and occupation until 1900. He was succeeded by one Bjorkland, who occupied the dwelling for about a year as tenant of Carroll. When Carroll moved out of the dwelling house he left his bed, stove, and dishes in the log house and his implements and utensils on the land, and returned periodically and farmed on the small clearing, planted potatoes, cut and cured hay, and cleared and con-

structed a road upon the land in dispute, went over the same to guard against trespass or fires, and sold or gave away some timber therefrom, permitting others to enter for that purpose, and also cut and removed timber for different purposes. Carroll sold the land to the respondent in the fall of 1904, and during the year following, by arrangement with respondent, Carroll occupied the land to the extent last described and raised and took away a crop of potatoes and hay from the small clearing. He occupied the house from time to time while engaged in these operations and also the hay shed for storage. There was also testimony to the effect that the designation of boundaries and manner of use and occupation by Carroll was that customary among homestead claimants or owners, and the land was generally known as Carroll's homestead, and there was also evidence that at least as early as January 14, 1903, and after the issuing and recording of the tax deed in question, the holder of this tax deed knew that Carroll was claiming possession and ownership of the land covered by the tax deed. Much of this evidence was controverted, it is true, but we are to consider the evidence most favorable to support the finding.

From the foregoing it was permissible to infer that the acts of ownership and possession of Carroll were not intermittent or transitory, because they all referred to his occupancy of the house, barn, and small clearing upon part of the tract, all held and claimed by him under the same grant, and because they succeeded actual and continued occupation and were in conformity to usages among people in that vicinity circumstanced as he was. Carroll's possession was not in any sense clandestine, but according to its nature, and in conformity to the usages of that vicinity, was visible and notorious in that it was well known and unmistakable and known to the holder of the tax deed. The land was not, therefore, within the meaning of sec. 1187, Stats. (1898), "vacant and unoccupied." The case in this respect is ruled by *Finn v.*

Wis. River L. Co. 72 Wis. 546, 40 N. W. 209, where the use and occupation of the land was of the same general character as that shown by the evidence in the instant case. There must be, as said in the case last cited, "actual and appropriate use thereof according to its locality, quality, and character; the evidences of such occupancy being tangible and visible to a person going upon and examining the land."

Furthermore, it has been decided that "the constructive possession of the tax-deed claimant only ripens into an absolute title when the lands remain vacant and unoccupied continuously during the whole period named in the statute." *Midlothian I. M. Co. v. Belknap,* 108 Wis. 198, 200, 84 N. W. 152, and cases cited. It would be quite difficult to affirm, upon the evidence in this case, that the land in question remained continuously vacant and unoccupied from May 20, 1902, the date of the tax deed, to May 20, 1905. If there is anything in *Daggett v. Reas,* 79 Wis. 60, 48 N. W. 127, inconsistent with *Midlothian I. M. Co. v. Belknap,* 108 Wis. 198, 84 N. W. 152, the latter case must prevail. Sec. 1190, Stats. (1898), defining what shall constitute possession within the meaning of foregoing sections, relates to the meaning of that word in secs. 1187 and 1189, Stats. (1898), rather than to the meaning of the words "vacant and unoccupied." Therefore there seems to be evidence warranting the finding of the circuit court, at least to the extent that such finding affirms that the land was not continuously vacant and unoccupied during the three years in question, and this is included in the broader affirmation of the finding that the land was during that time in the possession of the respondent and his grantor. The statute of limitations having divested the title of the tax-deed claimant and vested title in the respondent, the appellant's interest in the land or under the tax deed was at an end, and the respondent was not required, as a condition of his setting aside the deed, to tender or pay any part of the taxes under sec. 3087, Stats. (1898).

The respondent did not recover "by reason of a defect or insufficiency of any tax deed . . . or in the proceedings prior to the sale." Nor was the action in ejectment. The case is therefore not within the purview of sec. 3087. Nor is it within the terms of sec. 1210*h*, because the action does not impeach the tax deed. It would seem upon principle that when the statute of limitations has divested the tax-title holder of all estate or interest in the land, his tax deed is at an end for all such purposes.

By the Court.—The judgment of the circuit court is affirmed.

LAMOREUX, Respondent, vs. BAYFIELD COUNTY, Appellant.

April 20—May 11, 1909.

Action to annul tax: Tax certificates: Purchase pendente lite: *Notice:* Lis pendens: *Void tax certificates: Purchase by landowner: Recovery of money paid.*

1. After action brought to set aside a tax levy, a purchaser of tax-sale certificates *pendente lite* is bound by the judgment rendered therein even though no notice of *lis pendens* was filed.
2. A judgment annulling a tax necessarily destroys any tax certificate issued by virtue of such tax and defeats any deed issued on such certificate.
3. Where the tax, assessment on which it was based, and tax certificates issued thereon have been adjudged void, such tax certificates are destroyed for all purposes except as evidence of indebtedness of the county to the holder, and hence the owner of lands on which such certificates have been issued may buy them on an equal footing with a stranger to the title, and with the same right, under sec. 1184, Stats. (1898), to collect their face and interest from the county.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

This action was brought to recover the amount for which alleged illegal tax certificates were sold by the county treasurer of the defendant county, with interest thereon at seven

per cent. from the date of sale, and resulted in a judgment for plaintiff.

Prior to December 15, 1902, the lands described in the certificates involved in this action were owned by the Shores Lumber Company. On said date said company sold said lands under a land contract to Jacob Ryerson and E. M. Paulson, who assumed and agreed to pay the taxes assessed against said lands after said purchase. Thereafter the Shores Lumber Company conveyed the lands in question to the plaintiff in this action, subject to said land contract. Such land contract was foreclosed by plaintiff, and he became the sole owner of the lands by virtue of the foreclosure proceedings prior to September 14, 1906. The taxes for the year 1905 were not paid, and on May 14, 1906, and prior to the date of the annual tax sale for that year, the vendees in the land contract commenced an action to set aside the 1905 taxes on the lands involved. Such action was thereafter tried and an interlocutory judgment was rendered therein on October 16, 1906. The court adjudged the assessment void and set aside the assessment, the tax levied in pursuance thereof, and the tax proceedings and tax certificates issued upon the land involved (the same having been sold at the annual tax sale held in *Bayfield* county in May, 1906), and the tax proceedings were stayed until a reassessment of the property could be made pursuant to law, which reassessment was ordered by the court. The certificates were purchased by strangers to the title and were bought for speculative purposes. After the judgment in the action to set aside the taxes was entered and the order for reassessment of the property was made, the plaintiff purchased the tax certificates issued on the 1906 sale and became the owner thereof. The plaintiff, as such owner, filed a claim against *Bayfield* county for the amount of such certificates, with interest at seven per cent. from the date of purchase, pursuant to sec. 1184, Stats. (1908). The county board disallowed the claim upon the ground that the purchase of the tax certificates by the land-

owner constituted a voluntary payment of the tax, on account of which no right of action existed against the county. On appeal the circuit court reversed the decision of the county board and awarded judgment in plaintiff's favor for the amount of his claim. The defendant appeals from such judgment. The assignments of error raise the single question whether the court was wrong in holding that the purchase of the tax certificates by the plaintiff did not constitute a payment of the tax.

E. C. Alvord, for the appellant.

For the respondent there was a brief by *Sanborn, Lamoreux & Pray,* and oral argument by *F. B. Lamoreux.*

BARNES, J. The action brought to set aside the 1905 tax levy was commenced before the date fixed by law for the holding of the annual tax sale in May, 1906. The purchasers of the tax-sale certificates *pendente lite* were therefore bound by the judgment in the action, even though no notice of *lis pendens* was filed. *Brown v. Cohn,* 95 Wis. 90, 69 N. W. 71; *Bell v. Peterson,* 105 Wis. 607, 613, 81 N. W. 279. A judgment annulling a tax necessarily destroys any tax certificate issued by virtue of such tax and defeats any deed issued on such certificate. *T. B. Scott L. Co. v. Oneida Co.* 72 Wis. 158, 160, 39 N. W. 343; *Hixon v. Oneida Co.* 82 Wis. 515, 530, 52 N. W. 445.

It was stipulated in this action that the 1905 tax, on account of which the tax certificates in suit were issued, was set aside in the suit brought for that purpose, and that the assessment upon which the tax was based and the tax certificates in question were likewise set aside, and that a reassessment of the lands described therein was ordered presumably under the provisions of sec. 1210*b,* Stats. (1898). It does not appear that any proceeding was either taken or contemplated to review such judicial determination, although an appeal might be taken therefrom. *Johnston v. Oshkosh,* 65 Wis. 473, 27 N. W. 320. The record is silent as to whether a

reassessment was in fact made. There is nothing before us to impeach the verity or conclusiveness of the interlocutory decree of the court, and under the facts presented it must be held that it has wiped out the assessment upon which the tax certificates are based, as well as the tax itself, and has destroyed the certificates for all practical purposes in so far as they relate or pertain to the tax. The certificates as well as the tax and the assessment upon which they were based having been declared void, the liability of the county to refund the amount of the face thereof, with interest at seven per cent., became fixed by sec. 1184, Stats. (1898). *Pier v. Oneida Co.* 93 Wis. 463, 67 N. W. 702; *Norton v. Rock Co.* 13 Wis. 611, and cases cited in headnote.

It is contended by the appellant that the purchase of the tax certificates by the landowner was in substance and in fact a voluntary payment of the tax represented in the certificates, and that therefore no recovery can be had under the decisions of this court in *Babcock v. Fond du Lac,* 58 Wis. 230, 16 N. W. 625; *Parcher v. Marathon Co.* 52 Wis. 388, 9 N. W. 23; *Smith v. Lewis,* 20 Wis. 350, and kindred cases. At the time such purchase was made, the tax, the assessment on which it was based, and the tax certificates had been adjudged void. The certificates had no force or vitality as tax certificates. They had been destroyed for all purposes except one. They were evidences of indebtedness of the county to the holder thereof, which, taken in connection with the decree declaring them a nullity, established the right of such holder to reimbursement from the county. We think they were mere choses in action which the plaintiff might buy on an equal footing with any one else and with the same right of enforcement that his assignor would have, and that the decisions relied on by appellant have no application to the purchase of tax certificates by the landowner under such circumstances as surround the purchase here.

By the Court.—Judgment affirmed.

LAMOREUX, Respondent, vs. BAYFIELD COUNTY, Appellant.

April 20—May 11, 1909.

Lamoreux v. Bayfield County, ante, p. 394, followed.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

E. C. Alvord, for the appellant.

For the respondent there was a brief by *Sanborn, Lamoreux & Pray,* and oral argument by *F. B. Lamoreux.*

BARNES, J. Every material question involved on this appeal was likewise involved on the appeal in another action between the same parties, decided herewith (*Lamoreux v. Bayfield Co., ante,* p. 394, 121 N. W. 255), and the decision in this case is controlled by that in the case referred to.

By the Court.—Judgment affirmed.

GERMAN NATIONAL BANK OF BEAVER DAM, WISCONSIN, Respondent, vs. BAYFIELD COUNTY, Appellant.

April 20—May 11, 1909.

Lamoreux v. Bayfield County, ante, p. 394, followed.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

E. C. Alvord, for the appellant.

For the respondent there was a brief by *Sanborn, Lamoreux & Pray,* and oral argument by *F. B. Lamoreux.*

BARNES, J. This case is, in all respects material to the decision, identical with *Lamoreux v. Bayfield Co., ante,* p. 394, 121 N. W. 255, and is controlled thereby.

By the Court.—Judgment affirmed.

HEMENWAY, Respondent, vs. BEECHER and wife, Respondents, and AMERICAN BANK TRUST COMPANY, Appellant.

April 20—May 11, 1909.

Novation: Essential elements: Substitution of debtor: Judgments: Pleading: Sufficiency to charge new debtor.

1. The essentials of a novation are a mutual agreement to which the creditor, the old debtor, and the new debtor assent, by which the old obligation is extinguished and a new and valid obligation is created and takes its place.
2. Where a debtor transferred to a third person real and personal property, in consideration of which the third person agreed to pay his debt, and thereafter the debtor went to the creditor and told him of the arrangement, to which the creditor assented and agreed to accept the third person as obligor for the debt and release the debtor, the transaction constitutes a novation.
3. In an action at law on a promissory note, where the plaintiff brings in a third person whom the defendant alleges had assumed the debt for a consideration, and by the amended complaint, containing a complete copy of the defendant's answer, apprised the third person of the claim he must prepare to meet, in the absence of a motion under sec. 2656*a*, Stats. (1898), for further pleadings, the issue is sufficiently framed to warrant overruling an objection that a novation was not alleged in the complaint.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

The plaintiff brought action in the municipal court of Bayfield county against the defendant *Beecher* and his wife upon a promissory note for $55. The *Beechers* answered admitting the execution and delivery of the note, but claiming that thereafter the *American Bank Trust Company,* an Iowa corporation, agreed for value to pay the note, and that plaintiff thereupon released the defendants from liability. The defendants had judgment in the municipal court and the plaintiff thereupon appealed to the circuit court and made application to the latter court that the *American Bank Trust Com-*

pany be brought in as a party defendant. The application was based on an affidavit of plaintiff's attorney, stating the claims made by the *Beechers,* and denying that he agreed to the alleged novation, but claiming that a complete determination of the controversy could not be had without the presence of the trust company as a party. The motion was granted, the trust company made a party defendant, and the plaintiff ordered to serve an amended complaint. The amended complaint, after alleging the execution, delivery, and nonpayment of the note, set forth in full the answer made by the defendants *Beecher* in the municipal court, and then alleged that the plaintiff had no knowledge of the novation claimed by the *Beechers,* and denied that he ever released them from liability, but that he was unable to determine which of the defendants was liable on the note, and demanded judgment against such defendant or defendants as the court or jury should determine to be liable on the note. The trust company answered the amended complaint, denying any knowledge as to the execution or existence of the note, and further denying each and every allegation of the amended complaint. No further pleadings were served or filed. At the opening of the trial the trust company objected to any evidence tending to charge it with liability on the note, because no claim or cause of action was stated against it in the complaint, but the objection was overruled. The jury by special verdict found (1) that there was $90.57 due on the note; (2) that the defendant *American Bank Trust Company* promised for value to pay the note; (3) that the plaintiff, *Hemenway,* agreed with the defendant *F. E. Beecher* to accept the trust company for the payment of the note; (4) that *Hemenway* also agreed to release *Beecher* from all liability on the note. Motions to set aside the verdict and for judgment for the defendant trust company notwithstanding the verdict were overruled, and judgment rendered against the trust company for the amount of the note and costs, from which judgment the trust company appeals.

John Walsh, for the appellant.

For the respondents there was a brief by *A. W. McLeod,* attorney for the plaintiff, *Hemenway,* and *E. C. Alvord,* attorney for the defendants *Beecher;* and the cause was argued orally by *Mr. McLeod.*

WINSLOW, C. J. Two claims are made by the appellant trust company upon this appeal, viz.: (1) That there was no sufficient proof of a contract of novation; and (2) that there could be no judgment rendered against the trust company because there was no allegation in the complaint that it ever promised or agreed to pay the note.

As to the claim that there was no evidence of a contract of novation, we think it clear that it must be overruled. The defendant *F. E. Beecher* testified that he transferred to the company certain property, real and personal, together with some money, and that the company, in consideration thereof, not only agreed to pay off certain chattel mortgages upon the personal property, but also agreed to pay the note in suit. He further testified that shortly afterward he went to the plaintiff and told him of the arrangement and that the plaintiff said it was all right, that he would accept the defendant company as payor of the note and release *Beecher.* This testimony tended to prove all the essential facts necessary to constitute a novation, namely, a mutual agreement to which the creditor, the old debtor, and the new debtor assent, by which the old obligation is extinguished and a new and valid obligation is created and takes its place. *Bohn Mfg. Co. v. Reif,* 116 Wis. 471, 93 N. W. 466.

The claim that no judgment could be rendered against the appellant because there was no charge of novation in the complaint must also be overruled. Sec. 2610, Stats. (1898), relating to the interpleading of additional parties, and sec. 2656*a* of the same Statutes, relating to cross-complaints and proceedings where controversies arise between defendants, are very broad in their terms and were intended to give courts

plenary powers not only to call in new parties, but to mould the pleadings and dispose of all branches of a controversy in one action after having obtained jurisdiction of the necessary parties. The idea in both sections is to enable the court to grasp all the issues germane to the main controversy, whether arising between the plaintiff and the defendant, or between defendants, or between a defendant and an outside party, and dispose of them in one and the same action, and thus avoid circuity of action and multiplicity of suits. This purpose should be encouraged rather than discouraged by the courts. It is in line with the idea that courts are formed to decide controversies without unnecessary delay and without undue refinement as to pleading or procedure so long as the parties are before the court and the issues understood. It is true that the court has held that, in a purely legal action to obtain only a money judgment, the plaintiff cannot be compelled to bring in other parties than the one he has chosen to sue. *Taylor v. Matteson,* 86 Wis. 113, 56 N. W. 829. No such question is presented here. In the present case the plaintiff himself chose to bring in another party whom the defendant claimed had assumed the debt for a consideration. Had he not brought in this third party, and had the defendant's allegations been proven to the satisfaction of the jury, the plaintiff would have been obliged to go out of court and commence a second action against such third person, perhaps to be defeated in that action also. It seems that he should have the privilege, if he chooses, thus to settle the entire controversy in one action and avoid the necessity of two actions and the possibility of contradictory results.

Doubtless, under sec. 2656*a,* the court should have directed the defendants *Beecher* to serve an answer or cross-complaint on the appellant and required the appellant to answer thereto, because the real issue of fact in the case was between the defendants *Beecher* on the one side, alleging novation, and the appellant and the plaintiff on the other, denying any nova-

tion. This procedure would have been the more orderly, but the omission is not fatal, at least under the circumstances here present. The plaintiff's amended complaint contained a complete copy of the defendants' answer, thus apprising appellant of the claim which he must prepare to meet. This was served on the appellant and he answered thereto without objection. No motion was made by any one for any further pleadings. All parties came to the trial knowing the issues which they were expected to meet. Looking at matters of substance rather than of form, we cannot but regard the issue as quite fully made up, and therefore we think that the court rightly overruled the appellant's objection made at the opening of the trial.

By the Court.—Judgment affirmed.

OTT, Appellant, vs. BORING, Executor, Respondent.
SAME, Respondent, vs. SAME, Appellant.

April 20—May 11, 1909.

Reference: Review by court: Conclusiveness of findings: Appeal and error: Findings of trial court, when disturbed: "Clear preponderance:" Partnership: Dissolution: Accounting: Valuing assets: Evidence: Good will: Elements.

1. Findings of a referee, as regards being disturbed by the trial court on review, have the same dignity as findings of that court when challenged in the supreme court for error.
2. On appeal to the supreme court all reasonable doubts are to be resolved in favor of the findings of the trial court, and, unless wrong rules of law have been evidently applied to the evidence, if there appears to be substantial credible evidence in favor of the findings, a clear preponderance of the evidence is required to warrant weighing conflicting evidence and reversal of the findings of the court below.
3. "Clear preponderance" of the evidence requires the preponderance to be so apparent as to manifestly outweigh any probable legitimate influence upon the trier of those advantages for discovering the truth which the reviewing tribunal cannot have.

4. On an accounting to determine the value of firm assets after the death of one partner, it is error for the trial court to disregard the findings of the referee appointed to hear, try, and determine the cause, based on a carefully verified appraisement of the firm property, made in a judicial proceeding, and also verified upon the trial by the same appraisers, and modify such findings, basing such ruling upon the usual inventory and appraisement last made by the deceased for the purpose of determining the state of his business with reference to the condition a year previous. *F. Dohmen Co. v. Niagara F. Ins. Co.* 96 Wis. 38, distinguished.
5. On an accounting to determine the value of the firm assets after the death of one partner, the survivor is entitled to his share in the whole as an organized going business with its line of customers and connections with sellers as well as buyers, the merchandise, book accounts, and good will, such as there is, which can pass with a transfer of the whole as practically one thing.
6. Although one partner dies, elements of good will remain in the business where there is opportunity for a purchaser to continue the same as a going business as successor of the decedent part proprietor, whose name has for years distinguished it, and opportunity to continue in the old stand, and otherwise to locate so near as to obtain substantial advantages from the reputation of the old business in connection with the old place, and thereby secure more out of the stock and accounts by dealing therewith in the usual way of a going business than in a closing-up transaction.

APPEALS from a judgment of the circuit court for Ashland county: E. RAY STEVENS, Judge. *Affirmed on plaintiff's appeal; modified and affirmed on that of defendant.*

Accounting to determine the value of one fourth the merchandise, book accounts, and going business of a mercantile establishment owned by the plaintiff and Franklin J. Pool at the time of the latter's death, December 16, 1904, pursuant to the judgment of this court on a former appeal,—case reported in 131 Wis. 472, 110 N. W. 824, 111 N. W. 833. The trial was before a referee, who fixed the value of the stock at $71,639.69, that of the book accounts at $7,749.08, and that of the good will at $10,000, aggregating, with the value of some other property and with interest,

$106,635.98, which was found to be subject to such deductions as to leave the net amount for division $74,032.03.

Upon due motions and exceptions the court changed the conclusions of the referee by increasing the value of the merchandise by $39,987.86, making the total thereof $111,627.55, and the value of the book accounts $1,013.67, making the same $8,762.75 instead of $7,749.08, and modified the conclusion of law accordingly.

Due exceptions were taken and motions and rulings made, preserving for review questions treated in the opinion. Both sides appealed.

For the appellant there was a brief by *Sanborn, Lamoreux & Pray,* attorneys, and *Burr W. Jones* and *Horace B. Walmsley,* of counsel, and oral argument by *F. B. Lamoreux.*

R. Sleight, for the respondent.

MARSHALL, J. An examination of the record leads to the conclusion that there is an abundance of evidence to support the findings of the referee on each of the three questions of fact passed upon by him, viz.: one as to the value of the stock of merchandise, one as to the value of the book accounts, and one as to the value of the good will of the business, in the aggregate the value of the partnership property possessed by Mr. Pool and *Mr. Ott* at the time of the former's death. Such being the case it seems that the trial court, in making the radical changes of such findings, must have proceeded with erroneous notions of the law governing the matter.

We must assume it was well understood, as the fact is, that findings of a referee have the same dignity, as regards being disturbed by the trial court on review, as the findings of that court have when challenged here as being erroneous; they are not to be disturbed unless against the clear preponderance of the evidence. *Hinz v. Van Dusen,* 95 Wis. 503, 507, 70 N. W. 657; *Johnson v. Goult,* 106 Wis. 247, 250,

82 N. W. 139. Cases have gone so far as to hold that findings of a referee, appointed to hear, try, and determine, have the force of a verdict of a jury and are not to be disturbed if there is any credible evidence to support them; that having been supposed at one time to be required by sec. 2865, Stats. (1898), providing that "when the reference is to report the facts the report shall have the effect of a special verdict." *Dunbar v. Bittle,* 7 Wis. 143; *Briggs v. Hiles,* 79 Wis. 571, 48 N. W. 800. But that rule, early declared and subsequently, as late as *Briggs v. Hiles,* reiterated, has been modified so as to put a referee's findings in the same class with those of a trial court. *Johnson v. Goult, supra; Guetzkow Bros. Co. v. A. H. Andrews & Co.* 92 Wis. 214, 224, 66 N. W. 119; *Leasia v. Penokee L. Co.* 103 Wis. 304, 79 N. W. 224; *Bierbrauer v. Kuhnel,* 122 Wis. 306, 99 N. W. 1018. In *Wittmann v. Berger,* 125 Wis. 626, 627, 104 N. W. 815, the court remarked:

"There certainly is testimony supporting the finding, and we find ourselves unable to say that it is against the clear preponderance of the evidence."

The force of the rule referred to may well be appreciated by reference to the uniform administration of it as to findings of trial courts. All reasonable doubts are to be resolved in favor of such findings, and unless wrong rules of law were evidently applied to the evidence, if there appears to be substantial credible evidence in favor of the findings, it requires a pretty strong case to warrant weighing here the conflicting evidence and determining contrary to the decision below by striking a balance between the major and minor probabilities—the real right of the matter.

It is recognized that there are many things which cannot be spread upon the printed record, but may properly be considered by a trial court and are of great, and often controlling, significance in determining the truth as between conflicts from the mouths of witnesses. As experience shows,

and from the very nature of things, justice is much more likely to be done by leaning pretty strongly upon the initial determination than by endeavoring to treat a disputed matter from an original standpoint. Hence the rule that there must not only be a preponderance of evidence against such determination, but there must be a clear preponderance. The significance of the word "clear" is not always fully appreciated. Manifestly, that requires the preponderance to be so apparent as to manifestly outweigh any probable legitimate influence upon the triers of those advantages for discovering the truth which the reviewing tribunal cannot have. That is indicated by many expressions found in our decisions. For examples, we refer to the following:

"While this evidence might adequately have warranted the contrary, we cannot say that the conclusion reached by the trial court is without evidence in its support, or that such evidence is so overwhelmingly rebutted and overcome as to justify this court, on appeal, in setting that conclusion aside." *Menasha W. W. Co. v. Michelstetter,* 126 Wis. 427, 429, 105 N. W. 927, 928.

Whether the findings are supported by the evidence presents "a question of the character often met with as to whether the trial court properly weighed the evidence. That is one of the most difficult questions which a superior jurisdiction has to deal with as regards overruling a decision of the trial court, where it has the opportunity to meet the witnesses face to face and has other advantages over the court which only has the benefit of a printed history of the trial. We have enlarged upon this subject too many times and too fully to leave anything more which can be helpfully said. A clear preponderance of evidence against a trial court's finding, when such evidence must outweigh that which is in favor of such finding and all the advantages of the trial court which we have referred to, must necessarily be a preponderance so decided as to leave but little room for reasonable doubt on the question." *Rankl v. Schmidt,* 133 Wis. 103, 106, 113 N. W. 423, 424.

"Such preponderance is not effective to call for" disturb-

ing the findings "unless it is sufficiently manifest and convincing to overcome any probable effect, upon the judicial mind, of the appearance of witnesses or other aids, which only the trial court can have, in discovering the truth. . . . It is not improbable that the system requiring that fails to reach a just result in some cases. . . . The rule to which we have referred . . . is unbending. It admits of no exception where right rules of law are applied to the evidence. . . ." *Endress v. Shove,* 110 Wis. 141, 147, 85 N. W. 651, 653.

"It is one of the unbending rules" of the reviewing jurisdiction that presumptions are to be indulged in favorable to the correctness of the findings of fact to the extent of precluding the disturbance thereof unless the preponderance of the evidence not only appears to be against such findings but decidedly and clearly so. This court does not use balanced "judicial scales for the weighing of evidence. They are weighted down on one side at the start by the probability that the findings of the court involved are right. . . . The rule in that regard has been evolved by long experience of appellate tribunals, and is deemed to be the one most likely in the end to promote the ends of justice." *Von Trott v. Von Trott,* 118 Wis. 29, 34, 94 N. W. 798, 799.

As we have indicated, the quoted expressions apply as forcibly to the situation of a court of original jurisdiction in reviewing the findings of a referee, as to an appellate court in reviewing those of a trial court. The rule is applied here so often that, in general, where the only question presented for review is, whether the findings are supported by the evidence, and the clear preponderance requisite to disturbance thereof is not significantly apparent, they are treated as verities and the matter closed by a brief statement of the fact without burdening the record with an analysis of the evidence and demonstration of the correctness of the conclusion here. The somewhat lengthy treatment of the matter now is only indulged in because of the more than ordinary importance of the case and the seeming treatment thereof below, as if the reference had been to take the proofs and report the

same to the court, instead of to hear, try, and determine by findings which should have, by force of the statute, the dignity of a special verdict, as that term has been construed in regard to such matters, or in reviewing the findings wrong rules of law were applied.

There was evidence before the referee, upon one side, of a careful verified appraisement of the property made in a judicial proceeding and verified upon the trial by the several persons concerned therein, who testified at length, and appear, in the main, to have been entirely unprejudiced in the matter, while there was evidence upon the other side, of the usual inventory and appraisement last made of the property by deceased for the purpose of determining the state of the business with reference to the condition a year previous. The evidence, aside from the basis to start from, was not materially different on one side from the other.

The referee apparently regarded the basis made by the appraisers more reliable, in view of all the evidence, than the one depending on the books, while the court regarded the latter the more reliable, and was influenced in that regard by the rule in *F. Dohmen Co. v. Niagara F. Ins. Co.* 96 Wis. 38, 71 N. W. 69, or perhaps the court held the books to be, as a matter of law, the best evidence of the property on hand at the time the deceased made the inventory and appraisal. If so, the rule of that case was misapprehended. There the property had been largely destroyed by fire. As said in the opinion, the only evidence which existed was locked up in the books. Such being the case, it was said, in effect, that, starting with the last inventory and appraisal, the books, upon being verified to contain a history of the business as transacted from day to day, might properly be referred to by a person so as to enable him by their aid to testify as to changes in the stock subsequent to the inventory; that such evidence was proper to be considered under the familiar rule that the best evidence the nature of the case is susceptible of must be pro-

duced. The case did not lay down any arbitrary rule for the establishment of the facts in such a case, nor that the inventory and appraisal and books are, in all cases, the best evidence of the value of a business at any particular time. Here the property in question was appraised with reasonable care soon after Mr. Pool died. It was substantially all in existence at the time of such appraisal. The appraisers were just as competent, perhaps more so, to put a right cash value thereon as Mr. Pool was. They were quite as likely to have made a correct appraisal as the one who was mainly interested in determining the value of the business as compared with its value at the time of the preceding inventory and appraisal.

There are many reasons why the referee may well have regarded the case made by the defendant on the subject of value as reliable as that made by the plaintiff. But it is not thought best to go into the subject in detail. On the whole, it does not seem that there was any good ground for the trial court to have held that the evidence was clearly against the findings of the referee on the question of the value of the merchandise or of the book accounts. It would rather seem that the preponderance of the evidence is in favor of such findings, and that the learned trial court gave to the *Dohmen Case* altogether too much significance in reaching a conclusión. The referee in taking the appraisal made soon after the death of Mr. Pool as a basis to work from, instead of the last inventory and appraisal made by the deceased, did not violate anything said in that case.

On the question of good will we are unable to agree with counsel for defendant, that there is no substantial evidence to support the referee's finding. True, the evidence on the part of the plaintiff from the so-called experts, was given with reference to some elements of good will, which, under the circumstances, could not go with the business, but it is not true that there were no elements that could so go. All the property had

to be considered, the merchandise, the book accounts, and the good will, such as there was, which could pass with a transfer of the whole as practically one thing. The plaintiff was entitled to his share of the whole as an organized going business with its line of customers and connections with sellers as well as buyers. True, the personal element was extinguished by the death of Mr. Pool. True, the advantage of the particular location passed likewise. But there remained opportunity for the purchaser of the going business to continue it as successor of the proprietor whose name had for years distinguished it, and to obtain, if he could, opportunity to continue at the old stand, and otherwise to locate so near as to obtain substantial advantages from the reputation of the business in connection with the old place, and thereby secure much more out of the stock and accounts by dealing therewith in the usual way of a going business than in that of a closing-up transaction,—in short, those elements which naturally attract old customers to resort to the old stand and sellers to do likewise, inhering in the organized business, in a large degree, as it did before Mr. Pool's death. So the evidence of witnesses on one side that there was no element of good will of value after Mr. Pool's death, was as wide of the mark as evidence thereof with reference to elements which perished with his death.

Just what constitutes good will, in the technical sense, in all its aspects, would be difficult to state. It is not necessary in this case to go at length into the subject. We have said enough on this for the purposes of the appeal. Doubtless the referee took the whole situation, as we have viewed it, into account, including the fact that he reduced the value of the merchandise and book accounts to the basis of cash, as if the business were to be presently discontinued and the property turned into its money equivalent. When he came to place a value upon the good will, doubtless he took account of the amount the business was worth as an entirety, with all the

advantages that could legitimately go with it for a continuance thereof, over and above the cash value of the goods and accounts in a winding-up operation, fixing the same at $10,000, making the net value of the entirety for division $74,032.03, whereas such value on the face of things, looking at tangible matters and those substantially tangible, without discounting the appraised value of the merchandise or face of the accounts, was about $85,926.80, and on the basis the court adopted was somewhere around $130,000. In this view we are unable to say the final conclusion of the referee, placing the net value as above indicated, is against the clear preponderance of the evidence.

The foregoing leaves nothing more that need be said on either appeal. The conclusion is that no good reason existed for disturbing the referee's findings of fact in any respect.

By the Court.—The plaintiff will not take anything on his appeal. On defendant's appeal the judgment is modified to conform to the conclusions of the referee and affirmed as modified, with permission to the plaintiff, if desired, to enter a modified judgment in the court below accordingly. Costs are allowed to the defendant on both appeals.

HERRING, Appellant, vs. E. I. DU PONT DE NEMOURS POWDER COMPANY, Respondent.

April 20—May 11, 1909.

Master and servant: Injuries to servant: Negligence: Evidence: Concurrent negligence of master and fellow-servant: Assumption of risk: Contributory negligence: Printed case: Costs.

1. In an action for injuries to a servant caused by a sudden escape of acid from an earthenware spigot, evidence that, by reason of the inherent characteristics of the spigot, the core or plug thereof was liable to be raised in its socket by an upward pressure of acid to which it was subjected, that by such raising was

rendered possible and probable the escape of the acid in such a way as to endanger those necessarily working around the spigot, and that the device intended to prevent such raising was, by reason of wear and other surrounding circumstances, likely to fail of its purpose, is sufficient to warrant submitting the question of the master's negligence to the jury.

2. Where an injury to a servant is within anticipation by a reasonably prudent and intelligent person, except that extreme care in the adjustment of the apparatus in use would probably have protected against the injury, the duty of making such adjustment resting upon a fellow-servant, the master's liability and its proximate causal relation with the servant's injury are established, even though the defect is effective only in conjunction with the negligence of the fellow-servant.

3. It cannot be said as matter of law that a servant assumed the risk of his employment where there is evidence tending to show that, while the servant was expert in his knowledge of similar mechanical devices elsewhere in the factory, he was uninformed of the adequacy of the particular device to control, or of the danger arising from, hydrostatic pressure of liquid in a pipe.

4. Where the evidence is not conclusive either that an injured servant did not know, or that as an ordinarily prudent person in his circumstances he should have known or foreseen, that there was any peril in placing himself in the position in which he was injured, the question of his contributory negligence should be submitted to the jury.

5. A printed case not confined to matter necessary to present questions raised on appeal, and not even an abridgment thereof, violates Supreme Court Rule 6, and costs for its printing are within the prohibition of Rule 44.

MARSHALL, J., dissents.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Reversed.*

Action for personal injury. Defendant was the proprietor of a large plant at Barkesdale, Wisconsin, for the manufacture of dynamite and other high explosives. Plaintiff and a co-employee were charged with the duty of conducting the process of manufacturing nitroglycerine in one of the houses adapted to that purpose. The process consisted of drawing glycerine through one pipe into a tank called a "nitrator," and in drawing mixed nitric and sulphuric acid through

another pipe to mix therewith. The acid was first drawn in a charge of 7,000 pounds into a scale tank about eighty feet away and ten to twenty feet higher up, and then, by the opening of a gate valve at the outlet of that tank, flowed by gravity to the nitroglycerine house and into the nitrator. The pipe through which it was conducted was three or four inches in diameter, and near the open end thereof, emptying into the nitrator, was located an earthenware spigot, the core of which was slightly conical, extending vertically through the walls of the spigot with a two and a half inch hole through the core, which, being turned in line with the pipe, opened it and permitted the acid to run, and, being turned at right angles to the line of the pipe, closed it. This spigot was about eight feet from the floor of the nitroglycerine house and was lower than the scale tank from which the acid started, so that there were about eleven pounds upward pressure of the acid upon this conical plug, which weighed some nine and a half pounds. This pressure was of course greatly reduced when the plug was turned so as to permit the acid to flow through it. The core or plug fitted accurately into its socket, with the smaller end downward, but, as the persistent upward pressure of the acid was liable to raise it, it was fitted with a swinging board about ten inches in length, called a "chuk," which was cut on the lower end so as to be slightly eccentric, so that the longer side or the lower corner thereof should rest firmly on the plug and prevent its raising in its socket. If it rose so as to leave a space between the core and the walls of the spigot, the acid was likely to escape through such space, either dripping to the floor or being ejected with more or less force upward around the core. The same result was likely if a particle of dirt or sand got between the core and the walls of the spigot. The hanging chuk was so worn as to barely touch the top of this core at one point, and there was evidence that, by vibration in the building, it might become disengaged, all of which was fully apparent to observation. Plaintiff was a thor-

oughly skilled workman with this and similar apparatus. On the day in question he had filled the scale tank outside of the building, and, at a signal from his fellow workman, had opened the valve at that tank to allow the acid to run. The fellow workman at the time of giving such signal had opened the earthenware spigot sufficiently to allow the acid to run through it, and, as his duty was, had attempted to arrange the hanging chuk so as to press upon the core and hold it in place. Plaintiff, after opening the gate valve, had returned to the nitric acid house, and thereupon discovered a slight leakage from the bottom of the earthenware spigot. He thereupon, according to custom, mounted a stool about four feet in height to remedy this defect, presumably by pressing more firmly in place the core. As he mounted the stool and brought his face above the spigot, acid spurted upward therefrom into his face, causing him severe injury. No similar event had ever been known in the use of such spigots, which were common in similar processes elsewhere in the factory. At the close of the plaintiff's evidence the court rendered judgment of nonsuit, from which plaintiff appeals.

For the appellant there was a brief by *E. C. Alvord,* attorney, and *Sanborn, Lamoreux & Pray* and *Horace B. Walmsley,* of counsel, and oral argument by *Mr. A. W. Sanborn* and *Mr. Alvord.*

For the respondent there was a brief by *A. W. McLeod,* attorney, and *J. P. Laffey,* of counsel, and oral argument by *Mr. McLeod.*

Dodge, J. There being evidence that, by reason of the inherent characteristics of the earthenware spigot, the core or plug thereof was liable to be raised in its socket by the upward pressure to which it was subjected, that by such raising was rendered possible and probable the escape of acid in such a way as to endanger those necessarily working about such spigot, and that the device intended to prevent such rais-

ing was, by reason of wear and other surrounding circumstances, likely to fail of its purpose, we deem it clear that a situation was shown which the jury might have deemed inconsistent with that degree of care owed by the employer in a business dealing with such dangerous substances. There remains of the plaintiff's case, therefore, only the question of proximate cause. We have no doubt of the tendency of the evidence to establish actual causation, and that the injury was within anticipation by a reasonably prudent and intelligent person, except for the consideration that extreme care in the adjusting of the chuk would probably have protected against any such injury. The duty of such adjustment, several times daily, rested upon a co-employee. There is no evidence that he did or did not carefully perform that duty on the present occasion. If he did, and the injury nevertheless occurred as the result of the defects, the proximate causal relation would of course be obvious. If, however, the defects were effective only in conjunction with the negligence of a fellow-servant, the defendant's responsibility is no less certain under the law as fully established in this state. *Jones v. Florence M. Co.* 66 Wis. 268, 284, 28 N. W. 207; *Sherman v. Menominee River L. Co.* 72 Wis. 122, 128, 39 N. W. 365; *Cowan v. C., M. & St. P. R. Co.* 80 Wis. 284, 291, 50 N. W. 180; *Grant v. Keystone L. Co.* 119 Wis. 229, 237, 96 N. W. 535; *Howard v. Beldenville L. Co.* 129 Wis. 98, 113, 108 N. W. 48; Beach, Contrib. Neg. § 304.

There thus being evidence from which the jury might have found the defendant's negligence and its proximate causal relation with plaintiff's injury, the next question for consideration is whether the evidence conclusively establishes plaintiff's contributory negligence either by way of assumption of the risk or by any affirmative act. There is evidence tending to show that plaintiff, while expert in his knowledge of such mechanical appliances elsewhere in the factory, was uninformed of the inadequacy of this particular overhanging chuk; also,

that he was ignorant of the particular danger arising from the hydrostatic pressure of the liquid in the pipe, either as an influence to raise and loosen the plug or to cause the spurting of the acid. There is nothing in the surrounding physical facts to render incredible the first allegation of ignorance, nor do we think that the ordinary mechanic, though chargeable with knowledge of the physical structure of such an appliance, must irrefutably be presumed to have realized that the fact of the acid being brought from an elevation of several feet would produce pressure enough either to raise and loosen the plug or cause the spurting of the acid. It was an event which is not shown to have ever occurred in the factory, and one of which the probability became apparent only upon application of somewhat abstruse and special knowledge of hydrostatics, which we think is not necessarily and as matter of law attributable to the great mass of mankind circumstanced as plaintiff was. Reasonable minds might well differ upon the question, and therefore whether such a plaintiff assumed the risk.

Whether plaintiff is shown to have been guilty of affirmative acts of contributory negligence is perhaps a question of more doubt. True, it was his act in mounting the stool which brought his face in a position near the spigot from which his injury might result. True, also, it was possible to have escaped such danger by a trip to the tank in which the acid was stored some eighty feet away and outside the place of his work and there cutting off the flow of the acid through the pipe, though to somewhat serious interruption of the manufacturing process in hand. But that his act in mounting the stool and bringing his face over and near the spigot should be negligence it must have occurred under such circumstances that an ordinarily prudent and intelligent man would have foreseen at least the probability of some injury. The act itself was one required to be done many times daily in the performance of the work imposed on plaintiff and his

co-worker. If, as we have concluded in discussion of the assumption of the risk, it is credible from all the evidence that plaintiff or any other man of ordinary prudence and intelligence under like circumstances might have been unaware that there was any danger of the forcible escape of acid so as to imperil him, then it is not conclusively established that the act of ascending the stool was negligence at all, or that it had proximate contributing effect toward his injury. We think the evidence is not conclusive either that he did know or that as an ordinarily prudent person in his circumstances he should have known or foreseen that there was any such peril. We are persuaded that at the close of plaintiff's case the evidence was sufficient, unqualified and unexplained, to support a verdict for plaintiff on all of the issues and that the nonsuit was erroneous.

The printed case is not confined to matters necessary to present the questions raised, and is in no sense an abridgment of even that, as required by Supreme Court Rule 6. Its prolixity has necessitated much needless and wasteful expenditure of the time of the court which ought not to be diverted from more important duties. Rule 44 prohibits costs for printing such case.

By the Court.—Judgment reversed, and cause remanded for a new trial: no costs for printing case.

MARSHALL, J., dissents.

GRAY, by guardian *ad litem*, Respondent, vs. NORTHERN PACIFIC RAILWAY COMPANY, Appellant.

April 20—May 11, 1909.

Railroads: Injuries to employees: Scope of employment: Operation of locomotive: Negligence of engineer: Sufficiency of evidence: Contributory negligence.

1. **A railway employee directed by his foreman to place certain engines on a designated track is within the proper course of his duty in throwing a switch so as to permit the engines to run thereon.**
2. **A railway employee in the line of his duty has a right to have a locomotive, operated in connection with his duties, operated and managed with ordinary care and prudence.**
3. **Evidence that an engineer started his locomotive before any signal to start was given, it being customary to give such signal, permits the inference that the locomotive was mismanaged and negligently started.**
4. **The test of contributory negligence is whether or not the person injured exercised the degree of care at the time that ordinarily careful persons exercise under the same or similar circumstances.**

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

This is an action to recover damages for injuries received by the plaintiff while in the employ of the defendant as a hostler's helper in the railroad yards of the defendant at Livingston, Montana, and which injuries are claimed to be due to the negligence of the defendant. At the time of the accident, May 15, 1907, the plaintiff, although a minor but sixteen years of age, was an adult in size, weighing about 180 pounds. He had had previous experience as a hostler's helper as an employee of the defendant in the state of Washington, and on the evening prior to the accident had been employed by the defendant to perform the usual duties of a helper, building fires in locomotives, watching engines, furnishing them with water, and preparing them for service. He had

reported to the foreman of the roundhouse for orders, and during the first night of his employment had assisted the foreman in placing the locomotives coming into the yards upon the tracks as desired by the foreman. The plaintiff was injured while in the act of stepping upon the pilot of a moving engine which had been cut off from its train and was being brought into the yards by the engineer and fireman to be delivered to the hostlers. The engineer and fireman had completed their run and had brought the particular engine which caused the injury, a west-bound one, onto a lead track which connected with the various tracks in the yards. Plaintiff testified that he had been directed by the foreman of the roundhouse to place west-bound engines upon certain tracks. He testified that in obedience to orders from the roundhouse foreman he undertook to help to run this engine onto the "coal track;" that, before the engine had reached the switch by which it could be run upon the track upon which it was desired to place it, he had signaled the engineer to stop and that the engine stopped; that he crossed to the other side of the track and threw the switch; that he then went toward the pilot of the engine, intending to step upon it and from that position to give the signal to the engineer to proceed; that when he was a few feet in front of the engine and about to step forward to step upon the pilot the engine suddenly started without having been signaled to go ahead and without a warning by bell or whistle having been given; that it was impossible for him to withdraw; and that he raised his foot to place it upon the pilot as his only chance to save himself from injury, but that before he could complete this action he was thrown down by the engine and his foot was crushed so that it was subsequently necessary to amputate the leg below the knee. The alleged negligence of the engineer consisted in starting the engine without having received the signal from the plaintiff and in not giving a warning when about to move as the rules of the company provided.

The evidence of the engineer and of other employees of the defendant contradicted the testimony of the plaintiff as to the fact of the engineer stopping upon the signal of the plaintiff, as to whether or not it was customary for the engine crew to give a warning before starting when running in the yards, and as to whether or not plaintiff was at the place of injury in the proper discharge of his duty. It was claimed by the defendant that the plaintiff improperly took part in the service of throwing the switch and in placing the engine in the yards before it had been abandoned by the crew, and that he was guilty of contributory negligence. The questions of negligence and contributory negligence were resolved by the jury in plaintiff's favor. This is an appeal from the judgment on the verdict.

For the appellant there was a brief by *Louis Hanitch,* attorney, and *C. W. Bunn* and *L. T. Chamberlain,* of counsel, and oral argument by *Mr. Hanitch.*

For the respondent there was a brief by *Samuel A. Anderson* and *Richard Sleight,* and oral argument by *Mr. Anderson.*

SIEBECKER, J. The contention is that the defendant's engineer exercised ordinary care in operating and managing the engine at the time of the accident, and that therefore no negligence was shown making defendant liable to the plaintiff for the injury. There is evidence warranting the jury in concluding that plaintiff at the time of the accident was taking the engine in on the coal track under the roundhouse foreman's directions and that he did this in the regular course of his employment. The claim that he unnecessarily and voluntarily assumed to throw the switch for placing this engine in the yards is not free from dispute. If the jury should find that he was ordered to take this and other west-bound engines in on the coal track, it was within his proper course of duty under the facts and circumstances to throw this switch in

complying with this order. It cannot be said, therefore, that he was outside of his line of duty. Since the jury found him in the line of duty, it follows that he had a right to have the engine operated and managed at the time and place with ordinary care and prudence.

The inquiry is: Does the evidence sustain the jury's finding that the engineer was careless in handling the engine, and did such carelessness cause plaintiff's injury? There is evidence to the effect that in the customary way of performing plaintiff's service the person throwing the switch, after lining up the track, would take his place on the pilot and then give a signal to the engineer to start his engine, and that the engine was not started until such signal had been given. That the engineer started this engine before any signal to start was given by the plaintiff, who threw the switch on this occasion, is not disputed. This permits of the inference that the engine was mismanaged and negligently started and thereby imperiled plaintiff's safety. Hence the jury's finding that the defendant's engineer negligently started the engine and thereby caused plaintiff the injury complained of cannot be reversed as unsupported by the evidence.

The further claim is made that plaintiff was guilty of negligence in attempting to step onto the pilot while the engine was in motion. It is shown that plaintiff was stationed outside the rails, facing the engine, and in the act of stepping onto the pilot just after he had thrown the switch when the moving engine collided with and injured him. It appears in evidence that the customary way of performing the service in which plaintiff was engaged was to bring the engine to a stop near the switch to be thrown, to throw the switch, step onto the pilot, and then give the signal to start. Plaintiff testified that he was in the act of approaching the engine to step onto the pilot and give the signal to start; that when within about three feet of it he observed the engine moving toward him; that he was in the act of stepping onto the pilot when it struck

and injured him; and that in that situation he attempted to step onto the pilot as the best way to avoid injury from the moving engine. It is manifest that he was then in a perilous position which demanded immediate action to avoid the danger. It cannot be said as matter of law, in view of his situation and his opportunities for protecting himself, that his attempting to step onto the pilot to avoid the danger was negligence. He testifies that he did so to save himself—that he was about to take this step in the usual and customary way of performing the service assigned to him when he discovered the danger of being struck. Whether he exercised ordinary care in doing so is an inference of fact from the evidence, and should be resolved by the jury under the legal test of whether or not he exercised the degree of care at the time that ordinarily careful persons exercise under the same or similar circumstances. The jury found that he did. In view of the evidence this finding must stand as a fact.

No other questions are raised against the judgment.

By the Court.—Judgment affirmed.

SMITH and others, Respondents, vs. GOLDBERG, Appellant.

April 20—May 11, 1909.

Sales: Contracts: Construction: Ambiguity: Breach of contract: Negotiations for settlement: Notice of breach: Damages: Evidence: Duty to return property: Instructions to jury.

1. A stipulation in a contract that if a stallion purchased should not prove an average foal getter the seller would replace him with another horse of the same breed and age "equally as good," while ambiguous, is made certain by evidence that the intention of the parties was that the substituted horse should comply with the warranty as to being an average foal getter.
2. Negotiations of settlement, by substitution of another article in place of that contracted for, in no way modify the contract or

relieve from performance. At most their effect is to delay the time of performance, and the reasonableness of that time is for the jury.

3. A notice served before action brought stating that a contract of sale was rescinded, that such rescission was because of breach of warranty in the sale of a stallion and because the seller had failed to exercise and comply with contract requirements on such breach, that the stallion was held subject to the seller's order and risk, accompanied with offer to return the stallion on refunding the purchase money, and that suit would be brought unless the purchase money was paid, is not a rescission in the ordinary sense, but rather a notice of claim for breach and demand of the purchaser's damages under the contract.

4. On breach of a contract of sale of a stallion, the agreement being on failure of warranty to replace him with another equally good, or refund the purchase price "and take the horse back," no proof of damages is necessary, nor is the return of the stallion a condition precedent to the purchaser's right to recover. It is enough that he offers to return, and holds the stallion subject to the seller's order.

5. It is not error to refuse a requested instruction which has no basis in the evidence.

APPEAL from a judgment of the municipal court of Marathon county: LOUIS MARCHETTI, Judge. *Affirmed.*

This action was brought upon a special contract for the sale of a stallion by the defendant to the plaintiffs for the agreed price of $600. The contract contained the following stipulation or warranty:

"I warrant the Percheron stallion, this date traded to *A. W. Smith, B. H. Wright,* and *W. H. Hanchett,* to be an average foal getter if rightly managed, and in case he does not prove to be so I will replace him with another horse of the same breed and age, equally as good, or refund the six hundred dollars ($600), and take the horse back at my option. This guaranty to hold good one year from date."

It is alleged in the complaint that the stallion was not according to warranty and not an average foal getter when rightly managed, and the plaintiffs so notified defendant. The original complaint alleged a rescission of the contract, but this allegation by leave of court was stricken out, leaving

the complaint one for breach of contract. Defendant in his answer admitted the contract of sale, denied the other allegations of the complaint, and further alleged that he offered plaintiffs another stallion which complied with his agreement, but that plaintiffs refused to accept him; that negotiations between plaintiffs and defendant respecting supplying another horse continued until November, when defendant offered plaintiffs their choice of three stallions which complied with the warranty, but plaintiffs refused to accept any of them; and that defendant had been always ready and willing to comply with the terms of the warranty. At the close of the evidence defendant moved for a directed verdict, which was denied. A general verdict was returned in favor of plaintiffs, assessing their damages at $600 and interest at six per cent. from March 16, 1907. After verdict defendant moved for judgment dismissing the complaint and for a new trial. These motions were denied and judgment entered for plaintiff on the verdict, from which this appeal was taken.

The cause was submitted for the appellant on the brief of *Kreutzer, Bird & Rosenberry,* and for the respondents on that of *Regner & Ringle.*

KERWIN, J. The provisions of the contract of sale respecting the stipulation that, if the stallion purchased should not prove to be an average foal getter, the defendant would replace him with another horse of the same breed and age "equally as good," is rather ambiguous; but it is clear from the evidence that the intention of the parties was that the horse substituted should comply with the warranty as to being an average foal getter. This is not denied by defendant. So it follows that by the terms of the contract the defendant was bound to furnish an average foal getter of the same breed and age as the horse first furnished under the contract or refund the $600 and take the horse back. It is first claimed by appellant that he had not breached the warranty by failure

to replace the horse, because of negotiations between plaintiffs and defendant. These negotiations in no way relieved the defendant from the performance of his contract. After notification by plaintiffs in June, 1907, that the horse was not according to warranty, the defendant suggested that the matter stand until the fact of sterility be surely shown, and after this there were some negotiations as to whether the plaintiffs might not take a younger horse and pay the difference in value. But these negotiations did not modify the original contract or relieve the defendant from performance of it. At most, the negotiations amounted to an effort to settle the matter by acceptance of a more valuable horse than the one agreed upon and payment of the difference in value if the parties could get together on such a deal, and the only effect such negotiations could have was to reasonably delay time of performance on the part of defendant in replacing the horse, in view of an effort to agree. Whether a reasonable time had elapsed, in view of all the facts and circumstances of the case, to enable the defendant to perform, was fairly submitted to the jury, and in finding for the plaintiffs the jury necessarily found that such reasonable time had elapsed before this action was commenced.

It is further insisted under this head that no sufficient notice was given the defendant, that plaintiffs' notice was one of rescission, and that thereby the defendant was put to the defense of a claim of rescission and not a claim for nonperformance, and hence there was no evidence to submit to the jury on the question of nonperformance. While the notice served before action brought stated that the plaintiffs rescinded the contract of sale made of the stallion, it further stated that such rescission was because the stallion was not an average foal getter as guaranteed in the agreement, and because the defendant had failed to live up to the agreement by exercising his option to replace the stallion or refund the $600 purchase price. The notice further stated that the stal-

lion was held subject to the order of defendant and that plaintiffs offered to return him on payment of the $600, and demanded that defendant refund the $600, and that thereafter the stallion was held at the risk of defendant, and that unless the $600 was paid within five days suit would be commenced for the recovery thereof. This notice was not a rescission of the contract in the ordinary sense of rescission, but rather a notice of claim for breach and demand of plaintiffs' damages under the contract. This notice was served on the 9th day of December, 1907, and the action commenced on the 31st day of December, 1907. The matter of compliance with the contract had been under consideration between the parties from May to December, 1907, the plaintiffs insisting that defendant should comply with his contract, until finally the notice of December 9th was served, and after that nothing was done by defendant to fulfil his contract. We think there was ample evidence to justify submission to the jury of the question of nonperformance of the contract by defendant.

It is further insisted by appellant that, the contract having been rescinded by the plaintiffs, no cause of action for breach existed, and that this is an action upon the contract for breach and cannot be maintained. This contention is based upon the idea that the notice heretofore referred to operated as a rescission of the contract; but, as before observed, the notice was not the ordinary rescission, but a declaration of the plaintiffs' purpose to hold defendant upon the contract, and this involved the return of the horse, which was not in compliance with the contract, upon payment of $600, upon failure of defendant to replace the horse. No proof of damages was necessary. Proof of the breach established the plaintiffs' right to recover $600. This amount the defendant agreed to pay in case the horse sold was not as warranted and another in compliance with the warranty was not furnished. The plaintiffs are suing for specific damages stipulated to be paid in case of breach. *Park v. Richardson & B. Co.* 81 Wis. 399,

51 N. W. 572; *White v. Miller* (Iowa) 105 N. W. 993. But it is argued that the plaintiffs should first return the horse as a condition precedent to their right to recover the $600. This, however, is not the language of the contract. It provides that the defendant shall refund the $600 and take the horse back. The plaintiffs have offered to return the horse to defendant, and hold it subject to his order. That is all they can reasonably be expected to do under the contract. *E. T. Kenney Co. v. Anderson* (Ky.) 81 S. W. 663; *Osborn v. Rawson,* 47 Mich. 206, 10 N. W. 201; *Hall v. Ætna Mfg. Co.* 30 Iowa, 215. The charge of the court that the measure of damages is $600 was correct.

It is further argued that there was no right of rescission in the plaintiffs and that they could not rescind, and that they did not in fact make an unqualified offer to rescind. But the difficulty with this argument is that the plaintiffs' case is not based upon the ordinary rescission, but upon liability under express contract, which liability they seek to enforce in this action. The defendant was bound to pay the $600 and take the horse. On payment the defendant became at once entitled to the horse. There is no claim made but that plaintiffs were able, ready, and willing to deliver him upon such payment being made. Until they refused to deliver the horse there was no default on their part. *McWilliams v. Brookens,* 39 Wis. 334. On the showing made the defendant could have received the horse immediately upon payment of the $600, and this was his contract—to pay the money and take the horse back. This case is quite different from those cited in the brief of counsel for appellant, notably *Smeesters v. Schroeder,* 123 Wis. 116, 101 N. W. 363; *Boothby v. Scales,* 27 Wis. 626; and *Parry Mfg. Co. v. Tobin,* 106 Wis. 286, 82 N. W. 154. In these cases the question was one of ordinary rescission and right to recover upon such rescission, independent of any express promise to pay the purchase money back in case of breach of warranty. In *Boothby*

v. Scales, supra, it was held as matter of law that the offer to return came too late. In *Parry Mfg. Co. v. Tobin, supra,* it was held that in case of breach of warranty on sale to defendant he had two remedies, namely, one to return the defective article and recover the sum paid, with interest, or to retain the article and, if sued for the price, allege and prove the breach and have damages allowed by way of recoupment or counterclaim. In *Smeesters v. Schroeder, supra,* the case was one where the question arose as to the right, on breach of contract, to elect to stand upon the contract and recover for the breach, or to rescind the contract and upon return of what he had received recover back that with which he had parted, or its value, and that in case of rescission the contract went out of existence. But in the case before us the $600 recovered is stipulated in the contract as the amount which the defendant agrees to pay in case he fails to replace the horse in compliance with the contract.

The doctrine laid down in *Park v. Richardson & B. Co.* 81 Wis. 399, 51 N. W. 572, is applicable here. In that case defendant sold a furnace to plaintiff, and stipulated in the contract that if it did not work satisfactorily he would substitute a new one in compliance with the warranty or remove the furnace and refund the purchase price. It was held that the plaintiff had two remedies: (1) To notify defendant and demand removal of the furnace, and in case of failure to furnish a new one to bring an action to recover the purchase price; or (2) waive the right to have it removed and bring an action for breach of warranty. The court said:

"This action is in the nature of an action for rescission, though differing from an ordinary rescission because it is expressly provided for by the contract itself, and consequently governed thereby. It is apparent that in this case the damages would, under the terms of the contract, be the purchase money paid, with interest."

Whether the present suit be called one in the nature of an action for rescission, or for breach of contract in failure to

replace the horse or pay the $600, is wholly immaterial, because by the terms of the contract itself the defendant has expressly promised to pay $600 or furnish a horse in accordance with the contract. He has done neither, and the plaintiffs have recovered the $600 and interest.

Error is assigned because the court refused to give the following instruction:

"If *Mr. Goldberg* was ready and willing to give plaintiffs a better horse than Pluton, and was willing to exchange such better horse for Pluton for an additional price, which was commensurate with the difference in the horses, then he has fully complied with his contract."

There was no error in the refusal to give this instruction. It is based upon the theory that the contract had been modified by an agreement to take a better horse in exchange for the one furnished for an additional price. There is no basis in the evidence for such instruction. The court did instruct the jury that, if the defendant was justified in believing the plaintiffs desired to take time to negotiate and see whether they could not agree on some new substitution which would be mutually satisfactory, then the plaintiffs cannot claim a failure to live up to the contract while such negotiations were pending. This instruction was as favorable to defendant as he was entitled to under the evidence. We think the case was fairly tried and no error prejudicial to the defendant committed.

By the Court.—The judgment of the court below is affirmed.

MARSHALL, J. I cannot see that it is logical to dispose of this case upon the theory that the recovery is based, not on rescission, but on something in the nature of rescission. Either there was rescission or there was not. There is no middle ground. If there was rescission the proper measure of damages was the consideration for the horse purchased,

i. e. the $600 paid and the value of the horse given with the $600. If there was no rescission, the proper measure of the damages was the difference between the value of the stallion which did not comply with the warranty and the value of such an animal as was agreed upon.

I am not unmindful that in *Park v. Richardson & B. Co.* 81 Wis. 399, 51 N. W. 572, language was used to the effect that in case of purchase of an article with warranty coupled with an agreement that in case of its not proving to be as represented the seller will furnish a new one or take the thing purchased back and refund the purchase money, the amount agreed to be refunded stands as stipulated damages for the breach and that the action therefor is in the nature of rescission; but the very suggestion of rescission implies abrogation of the contract, rescission strictly so called, not something in the nature of rescission. There is no such thing as an action for rescission or in the nature of rescission other than an equitable action. In case of an action at law, involving rescission, the rescission occurs as a condition precedent to the right of action. It precedes the action instead of being the purpose thereof.

In this case it was agreed, in effect, that in case of the horse not proving to be of the kind agreed upon, the seller would substitute one of such kind or repurchase the defective animal at the price of $600, the seller to have the option which course to pursue. Having neglected to do either within a reasonable time, obviously, as a matter of law, the seller had the same remedies as in any case of an executory contract for the sale of an article where the subject of the sale is ready for delivery and the executory vendee neglects or refuses to take the same and pay the agreed price, viz.: store the property for the buyer or keep the same, using proper care in respect thereto, and sue for such agreed purchase price, in this case $600; or sell the property, using ordinary care to obtain the best price reasonably obtainable therefor, thereby liquidating

the damages, and sue for the deficiency; or keep the property as his own and recover the difference between the contract price and the market price at the place of delivery, or rescind the contract *in toto* and sue for damages, to be assessed under the well-known rule in *Hadley v. Baxendale,* 9 Exch. 341, recognized by this court as universally applicable, *i. e.* such as "may reasonably be supposed to have been in the contemplation of both parties when the contract was made as the probable result of the breach of it." That, as I understand it, has been very definitely declared by this court. *Pratt v. S. Freeman & Sons Mfg. Co.* 115 Wis. 648, 92 N. W. 368.

In this case it seems the plaintiffs elected to hold the horse subject to the order of defendant and sue for the purchase price of $600. They might have sold the property, as in *Pratt v. S. Freeman & Sons Mfg. Co., supra,* using reasonable care to protect the interests of the defendant, and sued for the deficiency. As they chose not to thus liquidate the damages but to sue for the full price at which defendant agreed to buy back the horse, storing the animal with themselves for the defendant, it is still their property and plaintiffs, doubtless, may yet sell it, in a proper manner, as indicated in the case referred to, and apply the net amount obtained; the gross amount less reasonable expenses for keeping the animal and making the sale, upon the judgment against defendant, or he may yet have the horse or its reasonable value, being liable for the reasonable expense of the plaintiffs as bailees. Thus I concur in the result of the appeal but place such result upon the reasoning indicated.

GOULD and another, Respondents, vs. MERRILL RAILWAY & LIGHTING COMPANY, Appellant.

April 21—May 11, 1909.

Appeal and error: Estoppel to allege error: Drawing jury: Refusal to discharge jury: Harmless error: Street railroads: Negligence: Pleading: Injuries to persons using the street: Duty of motorman: Negligence of motorman: Gross negligence: Questions for jury: Proximate cause: Instructions to jury: Notice of injury: Amendment of answer: Requests for instructions: Admission and exclusion of evidence: Duplication of damages: Measure of damages: Domestic animals: Bill of costs: Items.

1. The drawing of a jury for the trial of the cause, after issue joined but before filing the summons and complaint, is not error of which one who has participated in the selection of the jury can complain.
2. In the absence of proof of actual misconduct on the part of the jury, it is not prejudicial error to refuse to discharge the jury and grant a *ventre de novo* upon the ground that the trial, interrupted by adjournment, had been continued over a period of six weeks, although but six days of that time was spent in actual trial.
3. In an action for injuries alleged to have been caused by the negligent management of a street car, a complaint charging acts of the motorman to have been done "negligently, carelessly," etc., not intentionally, does not charge gross negligence, although it is also averred that the motorman knew the probable consequence of his acts.
4. To constitute gross negligence the act or omission causing the injury must itself have been wanton or wilful.
5. Where the only negligence which could be charged against a street railway company consisted in the motorman unnecessarily continuing to sound his gong after he saw the frightened condition of a team of horses or in failing to stop or slacken the speed of his car under the same circumstances, and while the mere fact that the horses took fright at the approaching car gave no right of action, if the condition of the team running away was so visible to the motorman that he must have known the cause of their fright, and took no precaution to slacken the speed of his car or stop ringing his gong, or both, the railway company is liable.
6. A motorman of a street car is required to keep a proper lookout

to avoid collision with persons or vehicles also using the streets, and to do all that an ordinarily prudent and careful person under like circumstances would do to avoid injuring others lawfully using the streets.

7. Whether or not, considering the shortness of time that a motorman rang his gong and the shortness of the distance traversed after he was aware of the frightened condition of a team of horses, the motorman was negligent in failing to slacken his speed or stop ringing his gong, is for the jury.

8. Where a probable potential cause is shown which may be identified as the proximate cause and made to answer the legal definition thereof by inferences of fact from direct or circumstantial evidence before the jury, the jury may identify this as a proximate cause, although strict logic might discover other causes which the jury might from the same evidence have found to be the proximate cause.

9. What is the proximate cause of an injury is usually and ordinarily a question of fact, and probative inferences from facts in evidence cannot be disposed of by styling them conjectures.

10. In instructions to the jury the use of the adjective form "ordinary" instead of the adverbial form "ordinarily," to qualify or modify the adjective "prudent," is not ground for reversal unless the jury were misled thereby.

11. A street railway company is not one of the railroad corporations covered by sec. 1816*b*, Stats. (1898), and an action for injuries to a team of horses is not one to recover damages for injury to the person mentioned in subd. 5, sec. 4222. Hence it is proper to deny an application for leave to amend an answer interposed in an action for damages arising from the killing of a team of horses by the negligence of a street railway company, so as to allege the commencement of the action more than one year after the injury, and that no notice of the injury was given.

12. Refusal to give correct requested instructions is not error where the instructions given fairly cover the points contained in the requests.

13. Error in rejecting competent evidence is harmless where the same witness is permitted to give such evidence fully on cross-examination.

14. The supreme court will not consider an assignment of error to the admission of evidence in the absence of sufficient exception.

15. Where, in addition to evidence tending to show a depreciation in value of a horse by reason of an injury sustained, the plaintiff offered evidence of the value of its use over and above the cost of keeping, an instruction permitting the jury to assess damages consisting of the depreciation in market value, plus the

value of the use of the horse during the time it was incapacitated, plus the cost of doctor's services and medicines and services of others necessarily performed, plus reasonable and necessary cost of maintenance, not exceeding all together in any case the actual value of the horse when injured, does not authorize duplication of damages, since the value of lost use mentioned, construed with reference to the evidence, means the value of the use of the horse over and above the cost of its keeping.

16. Where there is a recovery of the full value of a horse there can be no additional recovery for loss of use of the horse.

17. Items of a bill of costs consisting of charges for drafting requests for instructions, drafting affidavits on motion to modify an order, drafting notice of examination of adverse party, drafting order denying motion to limit examination of adverse party, attending motion out of term to limit the examination, and attending on examination of witnesses out of court, are "necessary entries, pleadings and proceedings in an action according to the practice of the court," within the calls of sec. 2921, Stats. (1898), and are properly allowed.

APPEAL from a judgment of the superior court of Lincoln county: ALMON A. HELMS, Judge. *Affirmed.*

For the appellant there was a brief by *F. J. Smith* and *John Van Hecke,* attorneys, and *B. R. Goggins,* of counsel, and oral argument by *Mr. Goggins* and *Mr. Smith.*

Among other references upon the part of the appellant were the following: *Rideout v. Winnebago T. Co.* 123 Wis. 297, 101 N. W. 672; *O'Brien v. C., St. P., M. & O. R. Co.* 102 Wis. 628, 78 N. W. 1084; *Cawley v. La Crosse City R. Co.* 101 Wis. 145, 77 N. W. 179; *Walters v. C., M. & St. P. R. Co.* 104 Wis. 251, 80 N. W. 451; *Collins v. Janesville,* 117 Wis. 415, 94 N. W. 309; *Weed & G. Mfg. Co. v. Whitcomb,* 101 Wis. 226, 77 N. W. 175; *Whereatt v. Worth,* 108 Wis. 291, 84 N. W. 441; *Duthie v. Washburn,* 87 Wis. 231, 58 N. W. 380.

For the respondents there was a brief by *Smart & Curtis,* and oral argument by *E. M. Smart.*

Among other references upon the part of the respondents were the following: *Van Salvellergh v. Green Bay T. Co.* 132

Wis. 166, 111 N. W. 1120; *Eastwood v. La Crosse City R. Co.* 94 Wis. 163, 68 N. W. 651; *Fay v. M., St. P. & S. S. M. R. Co.* 131 Wis. 639, 111 N. W. 683; White's Supp. to Thomp. Neg. § 1420; *Nolan v. Kroening,* 130 Wis. 79, 109 N. W. 963; *Bohn v. Racine,* 119 Wis. 341, 96 N. W. 813; 1 Suth. Dam. § 57; 4 Suth. Dam. § 1101; *Dunn v. State,* 125 Wis. 181, 102 N. W. 935; *Palmer v. Schultz,* 138 Wis. 455, 120 N. W. 348; *Hill v. Durand,* 58 Wis. 160, 15 N. W. 390; *Woodruff v. Depere,* 60 Wis. 128, 18 N. W. 761; *Bonesteel v. Orvis,* 31 Wis. 117; *Lam Yee v. State,* 132 Wis. 527, 112 N. W. 425; *Sweain v. Donahue,* 105 Wis. 142.

TIMLIN, J. The plaintiffs in this action, founded upon alleged negligence of defendant, had a special verdict finding the motorman in charge of defendant's car negligent; that this negligence was the proximate cause of the injury to plaintiffs' horses, wagons, and harness; that the plaintiffs were free from contributory negligence and their damages were $450. Considering the commonplace nature of the action and the amount involved, the litigation seems to have been conducted with such zeal, industry, and pugnacity from the selection of the jury to the final taxation of costs as to present an unusual number of disconnected questions, necessitating to cover these questions an opinion of some length. We shall be obliged to rule upon some of them without discussion.

1. Drawing the jury for the trial of the cause, as provided for in ch. 295, Laws of 1905, as amended by ch. 272, Laws of 1907, after the commencement of the action and after issue joined but before filing the summons or complaint, was, to say the least, not error of which appellant, after having participated in the selection of that jury, can complain. We are inclined to the opinion that the fact of an action pending and at issue gives the right to demand and obtain in the manner provided by these statutes the jury there mentioned,

and that these objections, including the objection that the notice of trial did not fix any time for the hearing while the venire fixed a definite time for the return of the jurors, are technical and unsubstantial.

2. Error is assigned because of the refusal of the trial court to discharge the jury and grant a *venire de novo* upon the ground that the trial commenced on April 29, 1908, and was interrupted by several adjournments necessitated by the illness and death of the wife of the presiding judge, and was not finally concluded until June 6, 1908, although only six days of this time was spent in actual trial. It is said that during these adjournments the jurors had opportunity to see and did frequently see the street in question and points therein mentioned by the witnesses, but no actual misconduct on the part of the jury is charged. There was in this no error prejudicial to appellant.

3. The complaint averred that plaintiffs were copartners and owners of two certain horse teams with wagons and harness, the defendant a corporation operating a street railway on West Main street and elsewhere in the city of Merrill, and while the plaintiffs were lawfully traveling with said teams and wagons westwardly on West Main street the motorman of defendant in charge and control of an electric street railway car also moving westwardly in said street approached the teams from the rear and "negligently, carelessly, unnecessarily, repeatedly, and continuously sounded the gong on said car in a loud and noisy manner," causing the rear team to become frightened. The motorman saw that the team was frightened and knew that, unless he desisted from rapid approach and from sounding of the gong, he would cause the team to get from the control of the driver and do serious damage, but, notwithstanding, "carelessly and negligently continued to sound said gong and make a loud noise, and negligently and carelessly failed to stop or to slow up or place the car under control, but negligently, carelessly, and noisily ran

the said car along behind the said team, and caused the same to become further and more excited and to start to run," etc., so that the teams both ran away and were injured, to plaintiffs' damage as stated.

It is contended that this complaint is based upon a charge of gross negligence, hence the trial court erred (1) in not so construing it; (2) in overruling the objections to the reception of evidence of negligence; (3) in not granting a motion for a nonsuit; (4) in not granting defendant's motion for a directed verdict; (5) in not correcting the verdict and rendering judgment in favor of the defendant on the verdict as corrected. But all these alleged errors disappear if the complaint merely charged ordinary negligence. We find no charge of gross negligence in the complaint. All the acts of the motorman complained of are charged to have been done "negligently, carelessly," etc., not intentionally. True, it is averred that the motorman knew the probable consequence of approaching rapidly ringing his gong, but that is not enough under the rule relative to gross negligence adopted by this court. Nothing is more common in ordinary negligence cases than to submit a question to the jury asking whether the defendant knew the consequences of his act. The disposition has been to err in such case by including in one question whether the defendant knew or ought in the exercise of ordinary care to have known these consequences. *Du Cate v. Brighton,* 133 Wis. 628, 114 N. W. 103; *Howard v. Beldenville L. Co.* 134 Wis. 644, 114 N. W. 1114. But to constitute gross negligence the act or omission causing the injury must itself have been wanton or wilful. *Wilson v. Chippewa Valley E. R. Co.* 135 Wis. 18, 114 N. W. 462, 115 N. W. 330. Illustration: The consequence of ringing the bell may be to frighten one team, but it may be required at the place by law or at the same time necessary to warn another. This group of alleged errors is therefore not effective for reversal.

4. Appellant next contends that, assuming the complaint

to state a cause of action for ordinary negligence, there was no evidence to support the finding of the jury that defendant was guilty of negligence which was the proximate cause of the injury complained of, hence that there was error in denying a nonsuit, in denying a motion to direct a verdict for defendant, in denying a motion to change the answers of the jury affirming its negligence and affirming proximate causation, to negative answers, and in denying certain requested instructions drafted with this view of the case. There is an unusual, and it would almost seem an unnecessary, difference between counsel with respect to the facts proven. This difference has materially increased the labor of this court and required a very close and critical examination of the facts in detail. Summed up these facts are as follows:

In the city of Merrill, Genesee street, fifty feet in width and running north and south, crosses West Main street, sixty feet in width and running east and west, and this crossing we take for a starting point. All points referred to, all acts of negligence, and all injuries in question occurred in West Main street west of this point and while the car in question and plaintiffs' teams were traveling west on West Main street. At this point there is on the northeast corner Wenzel's hardware store, variously referred to by witnesses, on the northwest corner Farkvam's saloon or hotel, a like point. Next to this on the west is Haase's, a like point. One hundred and thirty feet west from the west boundary of Genesee street is the east boundary of Wright street, which coming in from the north connects at right angles with, but does not cross, West Main street. Thirty feet further west along West Main street is the west boundary of Wright street, and here at the northwest corner of these two streets is a building referred to by the different witnesses as the Commercial Hotel, Thatcher's Hotel, and Tremont House. One hundred and ninety-two feet west of the west line of Wright street brings us to the east line of Juve's house, and a few feet farther west to

a point nearly in front of White's house where the car overtook and passed the teams and where one of the horses of the rearmost team jumped onto the rear bolster of the forward wagon and became entangled in a chain strung between the bolster stakes. Witnesses designate the same place or point by different names, variously estimate time and distances and relative positions, and this presents some apparent confusion and much contradiction in the testimony. But the testimony fairly warrants the conclusion that the driver of the rearmost team had heard the gong and the gong was rung at the above-mentioned point of beginning, although there are some loose statements which might create an impression that this occurred fifty feet further back or at the other boundary of Genesee street. A fair interpretation of the evidence leads us to believe that the ringing of the gong which disturbed the rearmost team began at the aforesaid point where the west boundary of Genesee street intersects West Main street. The whole distance covered from the time the motorman began sounding his gong until the accident was therefore 352 feet, as near as may be. With the street car moving at the rate of eight miles an hour it would require only thirty seconds to cover this distance, while if we accept the plaintiffs' version, that the car was moving at greater speed, the whole thing occurred in much less than thirty seconds. The impression from the testimony of witnesses, as is generally the case, would be that much greater time was occupied in the transactions detailed and in the sounding of the gong. What happened in this short space of time while the car was traveling this short distance seems to be that at the said point of beginning the motorman observed in the street ahead of him going in the same direction and on the north side of the track two teams, one a short distance ahead of the other, each with a wagon stripped for hauling lumber and the rear team rather close to the track. He sounded his gong, and the rear team was swerved away from the track toward the curb by its driver and showed signs of fright. As the car approached,

the indications of fright increased until the car reached a point in the track when the front part of the car was abreast of the front wheels of the rear wagon, and in this relative position the car and the wagon moved at the same speed and in the same direction and continued for some distance. The motorman did not slack the speed of the car and kept on sounding the gong, the rear team running at a rate of speed to maintain their position relative to the car. In this way the car and the rear team, moving on substantially parallel lines, overtook the forward team, and the rear team was of course brought on a run against the rear wheels and bolster of the forward wagon. This was about in front of White's house and 352 feet from the place of beginning. One of the frightened horses of the rear team being so brought up against the forward wagon leaped onto the wagon, became entangled in the chain mentioned, and the car without slacking its speed passed both teams at this point, and from the combination of circumstances, consisting of the rear team coming up running and jumping onto the wagon and the car passing ringing the bell, the forward team took fright and ran away, causing quite a severe wound to the horse which had leaped on the wagon, the breaking of some parts of the wagon, the harness, and some slight scratches on each of the other three horses.

The foregoing statement is made upon the facts with inferences therefrom which the jury might and probably did by their verdict find to be true. From this we think it is apparent that the only negligence which can be charged against the defendant consists in the motorman unnecessarily continuing to sound the gong after he saw the frightened condition of the rear team of horses or in failing to stop or slack the speed of his car under the same circumstances. The case is very close on this point; but the witness Miller testified:

"The street car was going along at full speed and the motorman was ringing the bell. It got up to the team, and it, the street car, did not lessen its speed when coming up to the team."

The street car did not go ahead of the horses at any time before the horses jumped onto the wagon. The bell began to ring at Wenzel's store. The witness Maas testified that the bell rang up to the time of collision. The witness Germain testified that he drove the rear team, that he heard the bell ringing as the cars came up behind him, the horses began to tramp around a little and sheered off, and the car kept coming and ringing and ringing, and the horses kept getting worse until the car came up to him, when the horses started to run, and the car kept on going and ringing the bell and the horses kept on running, until, with the car slightly behind or alongside of the horses, they overtook the foremost wagon, and one of the horses leaped onto the back part of this wagon.

While a street railway company is not liable for damages caused by a horse taking fright at the sight of a street car in motion, or at the usual noise made by such car in motion, or at the ordinary and proper sounding of a gong or ringing of a bell on such car, yet the motorman or driver is required to keep a proper lookout to avoid collision with persons or vehicles also using the streets, and to do all that an ordinarily prudent and careful person under like circumstances would do to avoid injuring others lawfully using the streets. *Glettler v. Sheboygan L., P. & R. Co.* 130 Wis. 137, 109 N. W. 973. As was said in *Bishop v. Belle City St. R. Co.* 92 Wis. 139, 65 N. W. 733, the mere fact that the horses took fright at an approaching car gives no right of action. In the instant case the plaintiffs by pleading and proof do not, however, rely upon any such ground of liability. What is claimed here and what the evidence tends to support is that the motorman, knowing that plaintiffs' horses were frightened by these usual and ordinary sights and sounds and that there was a liability of injury resulting, continued to approach the frightened team and to run alongside of it or just behind it continuously sounding his gong and without slacking the speed of his car, and without proper regard for the rights of

others lawfully using the street, and in such manner and to such extent as ordinarily prudent persons under like circumstances would not do.

The close point on the evidence is whether, considering the shortness of the time that the ringing continued and the shortness of the distance traversed, the motorman could be held to have been negligent in failing to slack his speed or stop ringing his bell. Some little time for consideration and decision must be allowed him, no doubt, but on the whole there seems to be sufficient evidence to take the case to the jury. On the point that the condition of the team running away was so visible to the motorman that he must have known the cause of their fright, and that he should either have slacked the speed of his car or stopped ringing his bell, or both, before he attempted to approach and run alongside of the runaway horses, there are many cases affirming this ground of liability. *Oates v. Metropolitan St. R. Co.* 168 Mo. 535, 58 L. R. A. 447; and see cases collected in a note to *Greene v. Louisville R. Co.* 7 Am. & Eng. Ann. Cas. 1126, 1127, 1129; also in note to *Union P. R. Co. v. Cappier,* 66 Kan. 649, 69 L. R. A. 513; 2 Thompson, Comm. on Neg. §§ 1419, 1420; Clark, Street Railway Acc. Law, § 114; *Heer v. Warren-Scharf A. P. Co.* 118 Wis. 57, 94 N. W. 789.

5. Appellant next contends that the finding of the jury that the negligence of the motorman was the proximate cause of the injury in question rests upon conjecture only, because no one can say that the injury in question would not have happened if the motorman had desisted from his speed and noise or that it did happen because of such failure to desist. We cannot agree with this refinement. When a probable potential cause is shown which may be identified as the proximate cause and made to answer the legal definition of proximate cause by inferences of fact from direct or circumstantial evidence before the jury, the latter may identify this as a proximate cause, although strict logic might discover other

causes which the jury might from the same evidence have found to be the proximate cause. In other words, what is the proximate cause of an injury is usually and ordinarily a question of fact, and probative inferences from facts in evidence cannot be disposed of by styling them conjectures.

6. The defendant requested the court to instruct the jury "that 'ordinary care,' as used herein and wherever used in these instructions and in the verdict, means that care which an ordinarily prudent person ordinarily uses under the same or similar circumstances." Instead the court instructed the jury, " 'ordinary care,' as used in these instructions, means that care which an ordinary prudent person ordinarily exercises under the same or similar circumstances." This error assigned is based upon the fact that the court used the adjective form "ordinary" to qualify or modify the adjective "prudent," instead of the adverbial form "ordinarily." This is a very common error, not only in conversation but in writing, and the writings of some of the great masters of the English language are not without many slips of this kind, a collection of which may be found in text-books on grammar, composition, and rhetoric. But such errors are not ground for reversal unless the jury were misled thereby. In the instant case the jury must have understood the word "ordinary," notwithstanding its form, to qualify or modify the next succeeding word. The probability is that they understood the expression in the latter sense. The departure from the correct rule is not so great here as that in *Reffke v. Patten P. Co.* 136 Wis. 535, 117 N. W. 1004. The case in this respect is ruled by *Nass v. Schulz,* 105 Wis. 146, 151, 81 N. W. 133, and *Pumorlo v. Merrill,* 125 Wis. 102, 107, 103 N. W. 464. And see *Anderson v. Chicago B. Co.* 127 Wis. 273, 281, 106 N. W. 1077, and cases.

7. The action was commenced more than a year after the injury and no notice of the injury was given, and the defendant on the trial asked leave to amend its answer by pleading

this failure. The defendant street railway is not one of the railroad corporations covered by the provisions of sec. 1816*b*, Stats. (1898), and the action is not one to recover damages for injury to the person mentioned in subd. 5, sec. 4222, Stats. (1898). The application to amend was properly denied.

8. Error is assigned in refusing to instruct the jury that there was no evidence of negligence on the part of the defendant up to the time the car caught up to or reached the rear team. For reasons already given this request was properly refused.

9. Error is assigned because the court refused upon proper request to instruct the jury that the defendant was not negligent because the horses became frightened from noises which are usual and ordinary and incident to the operation of street railway cars, and, applying this, that if the jury found it to be the fact that the motorman sounded the gong for a proper purpose and in the usual manner, this was not negligence, but one of the noises incident to operation. This was a proper charge under the facts of the instant case, but we consider it covered by the charge given in several different forms, particularly the following:

"The defendant or its motorman cannot be deemed negligent in controlling and operating a car merely because horses become frightened by reason of the ordinary, usual noises incident to the moving and operating of cars, or because horses become frightened by sight of the street car, or by necessary sounding of a gong on the car in the ordinary, usual manner, or because horses become frightened at the usual, ordinary speed of the car while it is moving, being operated with reasonable and ordinary care, along its track. . . . Ordinary care does not require that the motorman in charge of a street car shall stop a street car or slow it up merely because a team traveling on a street shies or shows signs of uneasiness. . . . Yet if it is reasonably apparent to the motorman that the team of the traveler on the street has either gotten beyond the control of the driver or is about to get be-

yond his control, so that it is apparent that an injury and damage is probable and reasonably certain if he, the motorman, does not slow up or stop his car or put it under control, then you may find that ordinary care would require the motorman under such circumstances to either slow up or stop the car or place it under control, if the circumstances permit, and that if he fails to do so he may be deemed not to have exercised ordinary care, provided always that you are satisfied an ordinarily prudent person would ordinarily so do under the same or similar circumstances."

Substantially the same rule was given with respect to the continued ringing of the bell. These instructions fairly covered the requests of the defendant on such points; hence there was no error in refusing the requests.

10. Error is assigned in rejecting evidence tending to prove that the injured condition of three of the four horses arose from overwork hauling heavy loads on a hard road during the six days next succeeding the runaway in question. This would seem to be quite a serious mistake had it not been that the same witness was permitted to testify fully on this point on cross-examination without objection. Under these circumstances the error was obviated.

11. After the accident in question the horses concerned appeared to have been engaged in heavy work for the next succeeding six days. Later on three of them upon which there were no serious visible wounds or injuries, and which were not shown to have been thrown down or to have collided with anything, developed, according to the testimony on the part of the plaintiffs, sickness materially affecting their ability to work and their market value, which sickness it is unnecessary to describe here in detail. Error is assigned in permitting witnesses to testify that in their opinion such sickness and disability was caused by the accident in question, but we are unable to consider this assignment of error because no sufficient exception was taken to the admission of this evidence.

12. In addition to evidence tending to show a depreciation

in value of each one of the four horses by reason of the injury in question, the plaintiffs offered evidence of the value of the use of a team per month over and above the cost of keeping, also the cost of feeding each horse per day, also the rate of wages of men employed to take care of the horses, also the value of the services per day to take care of the horses. Objection was taken by defendant on the ground that the cost of feeding horses and keeping is not a proper element of damage. The evidence as to the number of days' time lost was objected to, but the court overruled the objections, and in his instructions to the jury upon this point submitted four items of damage to each horse: (1) The difference between the actual value of the horse at the time of the accident and the value at the time of its recovery from the injuries sustained so far as it had recovered; (2) the loss of the use of each horse being unable by reason of these injuries to work for such period as the evidence showed; (3) the expense incurred by the plaintiffs in attempting to cure each horse of its injuries resulting from the accident; and (4) the actual reasonable and necessary cost of feeding the horse during such time. This portion of the charge relative to damages was excepted to. Considering the evidence before the jury and the instructions which permitted the jury to assess damages consisting of the depreciation in market value of each horse caused by the injury, plus the value of the use of the horse during the time it was incapacitated from work by reason of the injury, plus the cost of doctor's services and medicines and services of others necessarily performed in taking care of such horse, plus the reasonable and necessary cost of feeding the horse during such time, not exceeding all together in any case the actual value of the horse on the day the injuries were received, the damages were not in excess of compensation for the loss. The value of the lost use mentioned in the instructions must be construed with reference to the evidence as offered, and means the value of the use of the horse over and above the cost of its keeping. There was consequently no

duplication of damages. 1 Suth. Dam. (3d ed.) § 57; *Oleson v. Brown,* 41 Wis. 413; *Plunkett v. M., S. S. M. & A. R. Co.* 79 Wis. 222, 48 N. W. 519; *Page v. Sumpter,* 53 Wis. 652, 11 N. W. 60. But where the full value at the time the horse was injured is recovered, there can be no additional recovery for loss of use of the horse. *Page v. Sumpter, supra.*

13. The items of costs objected to and brought to the notice of this court by appellant's brief, consisting of drafting requests for instructions and drafting affidavits on motion to modify an order, and drafting notice of examination of adverse party, drafting an order denying a motion to limit the examination of adverse party, attending motion out of term to limit the examination, and attendance on examination of witnesses out of court, were properly allowed. Sec. 2921, Stats. (1898): "Necessary entries, pleadings and proceedings in an action according to the practice of the court." It follows that the judgment should be affirmed.

By the Court.—Judgment of the superior court affirmed.

KEELEY, Administratrix, Respondent, vs. GREAT NORTHERN RAILWAY COMPANY, Appellant.

April 21—May 11, 1909.

Parties: Joint tortfeasors: Witnesses: Cross-examination: Rebuttal: Railroads: Injuries to employees: Negligence of engineer: Instructions to jury: Damages: Measure: New trial: Grounds: Perjury of witness: Death: Statutory limit of damages: Amendment of statute: Retroactive construction: Appeal and error: Modification and affirmance: Costs.

1. In an action against two railroad companies for the negligent killing of plaintiff's intestate, testimony produced by plaintiff tending, in turn, to convict one railroad of negligence and exonerate the other, and convict the other and exonerate the one, justifies proceeding against both tortfeasors and the submission of the question whether or not the injury was due to con-

current negligence, or the unaided negligence of one, and, if so, which one.

2. In such situation the plaintiff, who had not seen the accident, was not obliged to try the case in advance and determine at her peril which testimony was true.

3. In an action against a railroad company for the death of a switch foreman, where the defendant's engineer had testified that his engine could not move at the time the foreman was killed because the air was on and the brakes set, it is not error to admit, on cross-examination, testimony that the engineer had had trouble with that engine five days before, that the engine would not stand still at that time, and that it then had a broken brake hanger.

4. In an action for the death of a switch foreman, alleged to have been due to negligence of an engineer in backing his engine, the complaint not charging negligence by the use of defective machinery, it is not prejudicial error for the court to charge, among other things, that "how far other facts in evidence bear on the question of the moving of the engine you will consider," when the court by various instructions impressed on the jury that they were to consider only whether or not the engineer failed in his duty to hold his engine in place.

5. Where a locomotive engineer is using a defective engine which could not be held in place by brakes, he may be guilty of negligence in approaching so close to cars as to be unable to check an involuntary movement of the engine until too late to avoid injury to one between the cars.

6. In an action by a widow, as administratrix, for negligence causing the death of her husband, it is not error to instruct the jury that plaintiff can recover the value of her "support and protection" by her husband during the time he might have lived.

7. It is not ground for a new trial that a witness admits that he testified falsely at the trial upon a material fact.

8. Where at the time of a negligent injury causing death the damages recoverable were limited by statute to $5,000, the amendment of that statute before the trial, increasing the limit to $10,000, does not increase the amount of damages recoverable.

9. Ch. 581, Laws of 1907, increasng the amount recoverable for death caused by negligence, creates a new right and does not merely change the remedy, and is not applicable to prior transactions.

10. Where the only prejudicial error affects the amount of damages, which can be corrected by reduction to the proper amount, the judgment is modified and affirmed.

11. Where the printed case does not comply with Supreme Court Rule 6, no costs will be taxed therefor.

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Modified and affirmed.*

On the 13th day of May, 1907, Michael Keeley, a switch foreman in the employ of the *Great Northern Railway Company,* was killed in the yards of the company in Superior by being crushed between a box car and a car in bad order, which latter car he was endeavoring to couple on to the box car with a wire cable. The switch track, on which the accident happened, is about half a mile long, extends from north to south, and had about thirty-five cars standing on it at the time. This track was used both by the appellant company and by the Lake Superior Terminal & Transfer Company, which is also a railroad corporation. Just prior to the accident a *Great Northern* switch engine backed in upon the south end of the switch track with a box car north of the engine for the purpose of coupling on to the bad-order car and pulling it out, and when the box car had approached close to the bad-order car the engine was stopped and Keeley went between the two cars to make the coupling with the wire cable. The plaintiff (who is the administratrix of Keeley's estate) claims that at about the same time an engine of the Terminal Company came in upon the north end of the switch and backed up the cars standing on the track, and that Keeley's death was caused by the concurrent negligent acts of the engineers of both engines, in that the *Great Northern* engine was suddenly backed up without warning and the Terminal Company's engine and train was moved forward without warning at the same time, and thus the bad-order car and the box car were brought together and the deceased was killed.

The action was originally brought against both companies, and they appeared and answered separately and the case went to trial. The jury found by special verdict (1) that the intestate was killed by being crushed between two cars; (2) that the *Great Northern* engine, operated by Engineer Zearfoss,

moved backward at the time Keeley was caught and crushed him between the cars; (3) that Zearfoss was guilty of want of ordinary care which contributed to Keeley's injury and death; (4) that such want of ordinary care was a proximate cause of such injury and death; (5) that the employees of the Terminal Company did not cause the bad-order car to be moved southward at the time of the accident; (6) that Keeley was not guilty of contributory negligence; and (7) that plaintiff's damages were $6,615. Judgment for the plaintiff was rendered upon this finding against the *Great Northern Company* and the action was dismissed as to the defendant Terminal Company, and the *Great Northern Company* appeals.

For the appellant there was a brief by *J. A. Murphy* and *C. H. Crownhart,* and oral argument by *Mr. Crownhart.*

W. P. Crawford, for the respondent.

WINSLOW, C. J. It is first claimed that the plaintiff should have been required at the close of her case to elect as to which defendant she would proceed against. She had produced one witness (Harty) who testified that the *Great Northern* engine was suddenly backed without warning and that the Terminal engine did not move, and another witness (Pierce) who testified that the Terminal engine moved southward and caused the accident, while the *Great Northern* engine and car stood still; and thus the evidence stood when the plaintiff's case closed. The claim cannot be sustained. The plaintiff herself did not see the accident and was obliged to depend upon the testimony of the two witnesses named. She could not herself determine certainly which one told the truth. Indeed, it might well be that each told the transaction just as he saw it, and that as matter of fact both engines moved at the same time, and that each witness was honestly mistaken when he testified that the other engine did not move. If so, and if the jury so concluded, then both companies were liable

as joint tortfeasors. On the evidence thus presented to her the plaintiff was entirely justified in proceeding against both and submitting to the jury the question to determine whether the accident was the result of concurrent negligence of both engineers or the unaided negligence of one, and, if so, which one. She was not obliged to try the case in advance and determine at her peril which witness told the truth.

It is next claimed that certain evidence was erroneously admitted. Zearfoss, the engineer of the *Great Northern* engine, was put on the stand by the defense and testified that he backed in on the switch track and stopped his engine on signals from Harty and Keeley, and set the brakes by applying seventy pounds of air, and that the engine did not move backward after Keeley went in to make the coupling. He further testified, in answer to questions, that the engine could not move during that time because the air was on and the brakes set. Upon cross-examination the plaintiff's attorneys asked him if he did not have trouble with the engine five days before, and he was allowed to answer under objection that the engine would not stand still at that time and that it had a broken brake hanger. The evidence was allowed as bearing on the question whether the engine could move or not on the day of the accident. We see no error in this ruling. The defendant by direct questions called forth from the witness the statement that the engine could not move at the time of the accident. Having made this broad and positive statement, it was certainly competent by way of cross-examination to show that under the same conditions, but a few days previously, the same engine would not stand still. That fact, if proven, would have material bearing on the weight to be given to his statement that the engine could not move on the day of the accident. Of course, it would be subject to explanation by showing that the engine had been repaired between the two dates, but apparently this was not done. We perceive no error in the ruling

In reference to the second question of the special verdict, the court charged, among other things, that "how far other facts in evidence bear on the question of the moving of the *Great Northern* engine you will consider." It is said that this instruction allowed the jury to consider and determine, in replying to questions Nos. 2 and 3, whether the moving of the engine was not caused by its defective condition, and that, as the complaint did not charge negligence by the use of defective machinery, fatal error was thus committed. We do not deem the objection tenable. The jury were carefully told in connection with question No. 3 that the duty of Zearfoss was to hold his engine in place, and the simple question was whether he performed that duty. Various instructions impressed on the jury the principle that they were to consider only whether Zearfoss failed in his duty to hold the car. If he knew he was using a defective engine which could not be held by the brakes, he would doubtless be guilty of negligence in approaching so close to the bad-order car that he would be unable to check an involuntary backward movement until too late to avoid injury to a man between the cars. In this view we cannot regard the charge as prejudicial.

The court charged the jury on the question of damages that the plaintiff might recover the value of her "support and protection" by her husband during the time he might have lived. This phrasing of the law has been approved by this court in a number of cases and cannot be considered erroneous. *Bauer v. Richter,* 103 Wis. 412, 79 N. W. 404.

It is argued that the verdict is contrary to the evidence, but upon this proposition we deem it sufficient to say that after careful examination of the record we are convinced that there was sufficient evidence to sustain the verdict.

A motion for a new trial was based in part upon an affidavit of Zearfoss to the effect that after the trial Harty admitted to him that he had testified falsely upon the trial as to the movement of the *Great Northern* engine. The court re-

fused to consider this affidavit and overruled the motion for a new trial. The ruling seems to have been correct. This court has held that the fact that a witness alleges that he committed perjury upon the trial of a cause, and will swear to a different state of facts if another trial be granted, is not ground for a new trial. *Loucheine v. Strouse,* 49 Wis. 623, 6 N. W. 360. The danger involved in placing verdicts at the mercy of weak or corrupt witnesses by granting a new trial when they admit perjury on the first trial is too apparent to require us to enlarge upon it.

The accident happened May 13, 1907, at a time when the statute (sec. 4256, Stats. 1898) limited the damages in an action of this nature to $5,000. Ch. 581, Laws of 1907, allows a recovery not exceeding $10,000, and the court held that this statute was applicable to the case in hand and so instructed the jury. In support of this ruling *Brewster v. Carmichael,* 39 Wis. 456, was relied on, but we do not find this case conclusive or persuasive. It was a trespass action not created by statute, and a law increasing the measure of damages recoverable in such actions passed after the trespass was held applicable to the case. Conceding the correctness of this doctrine as applied to a common-law cause of action, we are satisfied that it should not be held to apply to a purely statutory cause of action. When this accident happened the plaintiff had a claim for the recovery of not exceeding $5,000. Beyond this amount she had no claim or cause of action. When the legislature afterward said that in such cases there might be a recovery up to the sum of $10,000, they in effect created a new cause of action for the second $5,000. It was not a mere change in remedy, but to all practical purposes it created a new right of action. If it created a new right and did not merely change the remedy, it is not applicable to prior transactions. This is familiar law. The verdict, therefore, should not have exceeded $5,000. There being no other prejudicial error in the case, and this error affecting only the amount of

the damages, we see no reason why it may not be corrected here by reducing the amount of damages to the proper amount under the law as it stood at the time of the accident.

The printed case does not comply with Supreme Court Rule 6 and no costs will be taxed therefor.

By the Court.—Judgment modified by reducing the amount of damages to the sum of $5,000 as of the date of the judgment, and, as so modified, affirmed. The appellant is awarded costs, except that no costs are allowed for the printing of the case.

HOAG, Respondent, vs. NANSTAD, Appellant.

April 21—May 11, 1909.

Appeal and error: Insufficient assignment of error: Review: Questions of fact: Conclusiveness of court's findings.

1. **Assignments of error as to the rejection of evidence, leaving the supreme court to search for the particular rulings and offered evidence referred to and the relation thereof to other evidence in the case, will ordinarily be disregarded.**
2. **The determination of the trial court on a question of fact will not be disturbed unless clearly wrong.**

APPEAL from a judgment of the circuit court for Jackson county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

Action to recover on a promissory note of $150 given by the defendant to plaintiff. The defendant answered that the note was without consideration, in that it was given pursuant to and in consideration of a promise, on the part of plaintiff, who is a physician, to cure defendant of a dangerous disease of which he was, and still is, afflicted, and plaintiff has failed to do so.

The issues upon the evidence are indicated by the special verdict containing these findings: Plaintiff treated defendant

for varicocele. He has been fully paid therefor. The $193 note mentioned in the evidence was given by defendant for treating his wife and sister. The note in suit was not given in consideration of a balance due on the $193 note. When the $150 note was given and in consideration thereof, plaintiff promised to cure defendant of varicocele.

On motion the negative was changed to an affirmative finding and judgment was rendered for plaintiff as prayed for.

L. Olson Ellis, for the appellant.

G. M. Perry, for the respondent.

MARSHALL, J. The first error assigned is that the court refused to allow questions to be answered calling for evidence showing that the note was obtained by fraud. There seem to be two sufficient answers to that. *First.* Counsel fails to point out any place in the printed case indicating that any such evidence was rejected; thus leaving us to search through some over a hundred pages of printed matter to find out what the complaint is directed to and whether it has any foundation. Assignments of error as to the rejection of evidence, treated only in a most general way, leaving the court here to search for the particular rulings and offered evidence referred to and the relation thereof to other evidence in the case, cannot be regarded as worthy of consideration. Ordinarily such assignments of error are disregarded. *Roedler v. C., M. & St. P. R. Co.* 129 Wis. 270, 279, 109 N. W. 88. *Second.* Appellant seems to have admitted, as the trial court found, that the note was given in place of a previous note, given for medical treatment of appellant's wife and sister, and so it was in no way connected with the treatment of himself, in relation to which, as seems, it was claimed false representations were made.

The last foregoing really answers the ruling most complained of, *i. e.* that the trial court changed the finding of the jury on the question of whether the note in suit was given to

take up a partly paid note for $193, representing the agreed price to appellant for treatment by respondent of the former's wife and sister, from the negative to the affirmative. If the fact be as the court found, it efficiently answers or renders immaterial all of appellant's complaints, for no defense is claimed to the indebtedness to respondent for such treatment.

True, the evidence of plaintiff on the question of the consideration of the note is not clear, but it seems the court had very good reason for reaching the conclusion which it did. Under the rule that a determination of that nature will not be disturbed on appeal unless it appears to be clearly wrong, it is the opinion of the court that the decision must be regarded as right and to leave nothing for appellant to stand on in opposition to the judgment.

By the Court.—Judgment affirmed.

WILL OF JACOBS.

April 22—May 11, 1909.

Appeal and error: Harmless error: Erroneous admission or rejection of evidence: Conclusiveness of findings.

1. In a case tried by the court there can be no reversal because of the improper admission of evidence.
2. Findings of fact supported by competent evidence and not opposed to a clear preponderance thereof will not be disturbed on appeal.

APPEAL from a judgment of the circuit court for Jackson county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

The appeal is from judgment admitting to probate a lost or destroyed will. The evidence tended to disclose that E. F. Jacobs died October 31, 1904, leaving his widow, the contestant, as only heir at law, but also leaving him surviving the proponent of the will, *John H. Jacobs,* or Koch, and the lat-

ter's sister, Annie Jacobs, wife of a brother of the deceased, who had been taken into the testator's family as children and reared by him, but not legally adopted; that the decedent in his last illness and a few days before his death handed the contestant an envelope understood to contain his will, of which he had frequently made mention; that she put it in a satchel, and after the death made diligent search, but was unable to find the same; that deceased was incapable from the time of such delivery of gaining access to such paper without assistance; that on August 26, 1889, said decedent duly executed a will giving all of his property to his widow for life, and after her death to *John H. Jacobs* and Annie Jacobs, in certain contingencies; that a will was found recorded in the office of the register of deeds which corresponded in appearance and contents with the will so executed; and that decedent had at various times thereafter referred in general terms to having made such disposition of his property. The court found as facts the execution of such will, and that the same had never been revoked or canceled, and had either been lost or destroyed, by accident or design, and not by the act of the decedent. The appeal is brought by *Louisa Maria Jacobs,* the widow.

G. M. Perry, for the appellant.

James A. Stone, for the respondent.

DODGE, J. The appellant presents nineteen assignments of error, fourteen of which are upon admission of various items of evidence, for which, in a case tried to the court, there can be no reversal. *Wolf v. Theresa V. Mut. F. Ins. Co.* 115 Wis. 402, 405, 91 N. W. 1014; *Harrigan v. Gilchrist,* 121 Wis. 127, 314, 99 N. W. 909; *Currie v. Michie,* 123 Wis. 120, 127, 101 N. W. 370. Such assignments are necessarily frivolous and improper.

The only other assignments of error which are specific enough to be considered merely raise the question whether the

court's findings as to the execution and contents of the will and its subsequent loss or destruction, otherwise than by the testator's own act, can be sustained. Upon careful examination we are satisfied that all the material findings have support by competent evidence and that there is no clear preponderance opposed to any of them.

By the Court.—Judgment affirmed.

SCHMITT, Appellant, vs. SEEFELD and another, Respondents.

April 22—May 11, 1909.

Master and servant: Guarding machinery: Statutes: Construction: Safe place to work: Obligation of master: Contributory negligence.

1. A circular saw is not one of the parts of a machine or an appliance required to be guarded within the calls of sec. 1636*j*, Stats. (1898).
2. Sec. 1636*jj*, Stats. (Laws of 1905, ch. 303), does not enlarge sec. 1636*j* so as to include all appliances so located as to be dangerous to laborers in the discharge of their duties.
3. Where a servant in performing a service wholly deviates from the customary and reasonable method of performance and adopts a course wholly outside of what is to be reasonably expected, and thereby exposes himself to hazards not incident to the reasonable and customary way of performance, the master, under his duty of furnishing a safe place to work, is not liable to him for an injury.
4. Where a reasonably safe place to perform a service in the usual and customary way that servants may reasonably be expected to take has been furnished, the master has performed his duty, and if the servant sees fit to perform such service in a way which is not reasonably to be anticipated as one which would be adopted by any person under the circumstances, the master is not guilty of negligence.

APPEAL from a judgment of the circuit court for Clark county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

This is an action to recover damages for personal injuries alleged to have been sustained because of the negligence of the defendants in failing to guard and fence a saw and to provide a safe place for plaintiff to work. At the time the injuries were received the plaintiff was employed by the defendant partnership, which operates a mill in the city of Neillsville. He was working at one end of a table, in the center of which revolved a twenty-eight-inch saw, used to prepare material for the mill. Under the table, and so placed that the sawdust would be thrown into it and blown along by the air from the revolving saw, was a fixed cast-iron attachment forming a spout. Extending from this cast-iron spout to one of the legs of the table on the end at which plaintiff worked was a tin spout which carried the sawdust along. From the end of this tin spout it dropped to the floor. When the saw was continuously operated the sawdust would gradually accumulate on the floor at the end of the tin spout, and if not removed would fill the tin spout and the cast-iron spout and would then be thrown up into the face of the workman who stood where plaintiff worked. It was necessary to remove the accumulations of this sawdust from the floor five or six times a day to keep the machine in working order as regards it. This was done by removing the sawdust which had gathered on the floor near and about the tin spout. The sawdust which accumulated on the tin spout was jarred loose and off by striking or kicking it, and the saw would then clear the cast-iron spout. Plaintiff had removed the sawdust from the floor and was attempting to remove what had accumulated on the tin spout when he was injured. He had bent down until he was almost seated on the floor and had shaken the tin spout with his hand, when his foot slipped from under him and his arm was thrown up against the saw. A cut was made partly through the wrist and lower arm, rendering amputation necessary. There was evidence that the saw was not guarded below the table. It appears that it could have been guarded

at this point and that the sawdust might have been carried away by a blower. Thus the danger to which plaintiff was exposed in removing sawdust would be avoided. Plaintiff testified that the floor was not slippery or greasy, that his foot gave out, and that he fell right back on the saw. At the conclusion of plaintiff's case the court granted a motion for a nonsuit and awarded judgment dismissing the complaint. This is an appeal from such judgment.

For the appellant there was a brief by *R. F. Kountz* and *J. R. & C. R. Sturdevant,* and oral argument by *C. R. Sturdevant.*

S. M. Marsh, for the respondent.

SIEBECKER, J. The plaintiff claims that defendant was guilty of negligence in failing to guard or cover the saw under the table bed above described, in that the omission made the saw a dangerous appliance as regards employees in the discharge of their duties in operating the mill. It is urged that, under sec. 1636*j,* Stats. (1898), it was defendant's duty to cover the saw so projecting under the table because it was "so located as to be dangerous to employees in the discharge of their duties." This section requires that "belting, shafting, gearing," and various other appliances mentioned therein shall "be guarded or fenced" for the protection of employees engaged in labor near or about them. A saw is not enumerated in this section as one of the parts of a machine or as an appliance to be guarded or fenced.

But it is urged that the provisions of sec. 1636*jj,* Stats. (Laws of 1905, ch. 303), enlarge sec. 1636*j,* Stats. (1898), to the extent that all appliances so located as to be dangerous to laborers in the discharge of their duties are to be included. We do not find the claim justified by the language of the later section. It provides that, in actions by servants for damages on account of the negligent omission of the employer to guard or protect machinery or appliances "in the manner required

in the foregoing section," the defense of assumption of risk shall not obtain. The words employed in the later section clearly indicate that it was intended to refer only to such machinery and appliances as the former section embraces, and the context of the later section cannot, therefore, by any process of interpretation be held to enlarge the provisions of the former section so as to make it cover machinery and appliances not originally included in it.

It is contended that the evidence is sufficient to show negligence within the common law, in that the jury could have found defendant negligent in not furnishing plaintiff a reasonably safe place to work. It is not disputed that contact with the revolving saw under the table would be dangerous to life and limb. The situation presented, however, does not in itself constitute a negligent omission by the defendant to furnish plaintiff a safe place to work.

It is important to consider whether plaintiff, in the natural course of his employment while performing his service, would be brought near the running saw under the table. From the evidential facts it is manifest that his duties did not require that he get under the table to remove sawdust from the floor, nor was this necessary to shake it from the tin spout. Theretofore the operator had always successfully performed this service by using a shovel to remove the sawdust from the floor near the table. He then removed the accumulation from the tin spout by jarring it with his foot. Manifestly this could also be done by striking it with a stick. It appears, however, that the plaintiff, after he had removed the sawdust from the floor, crouched down under the table, took hold of the tin spout and shook it with his hand to loosen the sawdust and cause it to drop to the floor, and that while in this position his foot slipped, causing his body to fall, pitch forward, and to thrust his arm against the running saw. This manner of cleaning the tin spout was so unusual and obviously unnecessary that any danger attending the service was so remote from the ordinary, customary, and reasonable way as to relieve the

master from guarding against its dangers. The rule is that where a servant in performing a service wholly deviates from the customary and reasonable method of performing it and adopts a course wholly outside of what is to be reasonably expected, thereby exposing himself to hazards and dangers not incident to the reasonable and customary way of performing the service, then the master is not liable to him for any injury within his duty of furnishing a safe place to work. If the master furnishes the servant a reasonably safe place to perform the service in the usual and customary way that servants may reasonably be expected to take, then the master has fulfilled his duty. So in this case, as the trial court held, the plaintiff was furnished a reasonably safe place to remove the sawdust from the bolter in a manner reasonably well adapted to the performance of the service. He saw fit to perform this service in a way which was not to be reasonably anticipated as one which would be adopted by any person under the circumstances. We are of opinion that the trial court properly directed the dismissal of the complaint for the want of any evidence tending to show that the defendant was guilty of any negligence which caused plaintiff's injury.

By the Court.—Judgment affirmed.

PATRICK, Appellant, vs. PATRICK, Respondent.

April 22—May 11, 1909.

Divorce: Judgments: Conclusiveness of adjudication: Pleading: Issues raised by general denial.

1. An adverse judgment in an action by the wife for divorce on the grounds of cruel and inhuman treatment and failure to support is a bar to a counterclaim on the same grounds interposed in a subsequent action to a complaint by the husband for divorce for desertion.
2. A judgment, in an action by the wife for divorce, that the husband was not guilty of cruel and inhuman treatment and failure

to support, is not conclusive that the wife was living apart without cause, so as to entitle the husband in a subsequent action to a divorce on the ground of desertion.

3. A general denial puts in issue desertion by the wife charged in a complaint for divorce, and renders admissible evidence tending to show a voluntary separation and living apart.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

This is an action for divorce brought by plaintiff, appellant, against respondent on the ground of desertion. The respondent counterclaimed and asked for a divorce on the ground of cruel and inhuman treatment and failure to support. Respondent asked leave to amend by pleading the counterclaim by way of defense as well as counterclaim. This motion does not appear to have been ruled upon. The action was tried and the court found that the allegations of the complaint, as to the desertion of plaintiff by defendant, had not been proved and were not true. Judgment was entered dismissing the appellant's complaint and also the respondent's counterclaim, from which this appeal was taken.

For the appellant there was a brief by *Duffy & McCrory,* and oral argument by *J. H. McCrory.*

Roy D. Tillotson and *Maurice McKenna,* for the respondent.

KERWIN, J. It appears from the record that the parties to this action were married in June, 1900, and that in March, 1903, they separated, and soon thereafter the respondent commenced an action against the appellant for divorce on the ground of cruel and inhuman treatment, which action was tried and the complaint dismissed, and that plaintiff and defendant have not since lived together. It further appears that the cause of action set up in the complaint in the action of respondent against appellant was substantially the same as her counterclaim in this action. It is therefore contended in the present action that the judgment against the respondent

here in the former action, dismissing her complaint, which stands unmodified and unreversed, constitutes a bar to the respondent's right to now plead the same allegations in her counterclaim as were alleged in her former action and adjudicated in that action. The appellant moved for judgment on the pleadings, on the ground that the answer admitted the former judgment against the respondent upon the same cause of action as that set up in the counterclaim in this action, which judgment was entered June 15, 1903. The court overruled the motion. The appellant insists that the findings are not supported by the evidence. The court found that the allegations of the complaint as to the desertion of the appellant by the respondent had not been proved and were not true. From the written opinion of the trial judge in the record it appears that he found from the record in the former case and the testimony in the instant case that the separation and living apart was satisfactory to both parties and that appellant consented to the separation, and that the case is one of voluntary separation.

The main contention of appellant is that the former judgment is an absolute bar to the respondent's defense and counterclaim here and that no evidence should have been admitted under the counterclaim. It may well be that the former judgment pleaded was a bar to the respondent's cause of action set up in the counterclaim upon all issues tried and determined in that action, as contended by appellant. *Hart v. Moulton,* 104 Wis. 349, 353, 80 N. W. 599; *Rowell v. Smith,* 123 Wis. 510, 102 N. W. 1. It is well settled that facts once litigated and determined within the limits of the subject matter of the action and upon which the judgment rests are conclusive between the same parties. *Wentworth v. Racine Co.* 99 Wis. 26, 74 N. W. 551; *Hart v. Moulton, supra; Grunert v. Spalding,* 104 Wis. 193, 80 N. W. 589; *Rowell v. Smith, supra; Cromwell v. County of Sac,* 94 U. S. 351, 354; *Nesbit v. Riverside I. Dist.* 144 U. S. 610, 12 Sup. Ct. 746. Coun-

sel for appellant contends that the doctrine of the foregoing cases rules this case. In the former action the court found that the defendant (appellant here) did not fail and neglect to properly support the plaintiff (respondent here), and that defendant was not altogether guilty of the cruel and inhuman treatment set forth in the complaint and that he was not entirely blameless, and that none of the material allegations of the complaint as to cruel and inhuman treatment and failure to support had been proved, except that defendant did not furnish all clothing. The judgment rendered upon these findings, the appellant claims, establishes the fact that the respondent deserted the plaintiff when she left him in March, 1903, on the ground that, the judgment being conclusive that appellant was not guilty of cruel and inhuman treatment, respondent was not justified in leaving the home of appellant, and therefore such separation amounted to a desertion. But the conclusiveness of the former judgment does not warrant appellant's conclusion. The fact that respondent had no cause of action against appellant for cruel and inhuman treatment does not establish desertion on the part of respondent nor negative the finding of the trial court in this action to the effect that there was no desertion.

Regarding the admission of evidence under the answer little need be said. The general denial put in issue the desertion charged, and any facts tending to show that the separation and living apart were with the consent of appellant were admissible under the general denial. As we have seen, the court below was of opinion that the parties voluntarily lived apart. We think the findings of the court below are not against the clear preponderance of the evidence, and therefore the judgment must be affirmed.

By the Court.—The judgment below is affirmed.

THOMAS, Respondent, vs. WILLIAMS, Appellant.

April 22—May 11, 1909.

Assault and battery: Civil liability: Trial: Instructions to jury: Requests for instructions: Omission to define terms: Exemplary damages: Evidence: Pecuniary condition of defendant: Compensatory damages.

1. In an action for assault and battery, after counsel for defendant had submitted requests for instructions relative to the law of self-defense, and, by stipulation, all evidence tending to show plaintiff's reputation as a quarrelsome person was withdrawn, and the injury to plaintiff limited to the striking, and the result from the striking, of four certain blows, neither the plea of self-defense nor the requested instructions thereon having been withdrawn, it is not error to instruct the jury relative to the law of self-defense.
2. In an action for assault and battery, in the absence of requests in that behalf, it is not error to omit to define "malice," although the court used the word "maliciously" several times in its charge.
3. A charge to the jury on the question of exemplary damages which omits to include all the elements upon which such damages are found or awarded is not prejudicial where there is no request for instructions covering the omitted elements.
4. In an action for assault and battery, evidence of the wealth of the defendant is competent as bearing on the sum which would be just and sufficient as a punishment and deterrent in case of an award of exemplary damages.
5. In an action for assault and battery, an instruction as to exemplary damages, that the jury "should" consider defendant's wealth and that the damages "should" be proportioned to defendant's ability to respond, while mandatory instead of permissive, is not cause for reversal unless it appears that the defendant was prejudiced thereby.
6. Such instruction, taken in connection with the whole charge, in substance that the jury could not award exemplary damages unless the acts in question were done maliciously, that even then the matter of exemplary damages lay in their discretion, and informing the jury of the reasons for considering defendant's wealth under such circumstances, is not misleading.
7. In an action for assault and battery, an instruction that a preponderance of the evidence which satisfied the jury of the existence of damage to the plaintiff might form a basis for recovery, is not erroneous as instructing the jury to use that as a basis for prospective or future damages, where no recovery of such damages was authorized or had.

APPEAL from a judgment of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

The appeal is from a judgment rendered in an action to recover damages for assault and battery.

For the appellant there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *E. A. Evans.*

Among other references upon the part of the appellant were the following: *Lowe v. Ring,* 123 Wis. 107, 101 N. W. 381; 13 Cyc. 119; *Corcoran v. Harran,* 55 Wis. 120, 12 N. W. 468; *Fenelon v. Butts,* 53 Wis. 344, 10 N. W. 501; *Morrison v. Superior W., L. & P. Co.* 134 Wis. 167, 114 N. W. 434; *Elliott v. Bently,* 17 Wis. 591; *Howard v. Beldenville L. Co.* 129 Wis. 98, 108 N. W. 48; *Pickett v. Crook,* 20 Wis. 358.

For the respondent the cause was submitted on the brief of *Daniel H. Grady.*

Among other references upon the part of the respondent were the following: *Taylor v. Seil,* 120 Wis. 32, 97 N. W. 498; *Miles v. Stanke,* 114 Wis. 94, 89 N. W. 833; *Odette v. State,* 90 Wis. 258, 62 N. W. 1054; *Brown v. Swineford,* 44 Wis. 282; *Bading v. Milwaukee E. R. & L. Co.* 105 Wis. 480, 81 N. W. 861; *Heddles v. C. & N. W. R. Co.* 77 Wis. 228, 46 N. W. 115.

TIMLIN, J. The complaint was in the usual form, and the defendant averred that he merely defended himself against the assaults and attacks of the plaintiff, using no more force than was necessary, and denied everything alleged in the complaint not thereby admitted. During the trial, after the counsel for defendant had handed up to the court a request in writing for instructions relative to the law of self-defense in such case, by stipulation of counsel all evidence tending to show the reputation of the plaintiff as a quarrelsome person was withdrawn and the injury to the plaintiff was to be limited to the striking, and the result from the striking, of four certain blows, in case the jury found that these blows were

struck. Error is assigned because the court thereafter instructed the jury relative to the law of self-defense. It is contended this was prejudicial to the defendant. But defendant's counsel did not offer to withdraw the plea of self-defense in his answer or the instruction requested, nor otherwise bring to the attention of the trial court that he claimed any such effect from the stipulation above mentioned. Under these circumstances the court did not err in charging the jury relative to the law of self-defense. That issue was in the case until expressly withdrawn. Besides, we do not see how the stipulation could have the effect now claimed for it in any event.

In instructing the jury the court used the word "maliciously" several times as hereinafter quoted, but failed to define that word to the jury. The defendant made no request for such definition. Under these circumstances the failure to define "malice" is not error. *Taylor v. Seil,* 120 Wis. 32, 97 N. W. 498.

With reference to the error assigned relating to exemplary damages, the portions of the charge criticised are as follows:

"If you find for the plaintiff, and find from a preponderance of the evidence that the defendant's act in striking the plaintiff was done maliciously, vindictively, wantonly, or under circumstances of aggravation or insult, you may, if you see fit, but are not obliged to do so, award, in addition to compensatory damages, such sum as exemplary or punitory damages as you may think proper under the circumstances of the case by way of example or punishment in order to deter the defendant and others from offending in like manner in the future. If you award exemplary damages, you should consider the defendant's wealth so far as it appears from the evidence, as such damages, to accomplish their purpose, should be proportionate in some general way to the defendant's ability to respond. Exemplary damages are never a matter of right, but they, when allowable, may always be awarded or withheld in the discretion of the jury. . . . Exemplary damages may not be awarded unless the acts of the defendant in question were done maliciously, as I have explained malice to

you, and that even if malicious you may withhold or allow them as seems to you fit."

It is argued that this charge is erroneous because it failed to include an element far more important than the element of the wealth of the defendant, and that this latter fact was not the only element to consider in determining the amount of the damages, but the seriousness of the offense committed is fully as important as the defendant's wealth (citing 13 Cyc. 119). There was no request on the part of the defendant for additional instructions. Evidence of the wealth of defendant is considered competent in actions of this nature as bearing upon what sum would be just and sufficient as a punishment and a deterrent. *Draper v. Baker,* 61 Wis. 450, 21 N. W. 527; *Eggett v. Allen,* 119 Wis. 625, 633, 96 N. W. 803. The criticism on this part of the charge is to the effect that the court did not include all the elements upon which exemplary damages are found or awarded. In such case it is for the party objecting to the charge to request an instruction covering the omitted elements of damage. The charge above quoted is, however, defective in advising the jury that they "should" consider the defendant's wealth and that the damages "should" be proportionate in some general way to the defendant's ability to respond. The language is rather too mandatory. It should be merely permissive. The proper form of expression is that the jury may consider the defendant's wealth so far as appears from the evidence in a case otherwise proper for allowance of exemplary damages. But no criticism is made on this account by the appellant, and we are not satisfied that the defendant was prejudiced in the instant case by this difference in the form of expression. We notice it merely to show that it is not approved as above quoted. Taking the whole charge on the subject, it appears that the jury were instructed that they could not award exemplary damages unless the acts in question were done maliciously; that even then the matter of exemplary damages lay in their discretion; and the jury were told the reason for considering the defendant's

wealth under such circumstances. It is not probable that the jury were misled by anything of which the appellant complains in this part of the charge.

It is thought by appellant that the court below erred in its charge with reference to compensatory damages because the jury were instructed that a preponderance of the evidence which satisfied the jury of the existence of the damage to plaintiff might form a basis for recovery, and that while this is correct with reference to damages already accrued it is incorrect with reference to future or prospective damages. But a preponderance of evidence which satisfies the jury of the existence of the facts so supported is an approved form of instruction. *Gores v. Graff*, 77 Wis. 174, 46 N. W. 48, and subsequent cases collected in *Anderson v. Chicago B. Co.* 127 Wis. 273, 280, 106 N. W. 1077. There was not, as we interpret the instructions and the verdict in the instant case, any recovery had or authorized for prospective or future damages. The language of the instructions on this subject is as follows:

"Now, gentlemen, with these rules in mind, you will determine whether the plaintiff is entitled to recover. If she is entitled to recover, she is entitled to recover such damages as will compensate her for the injuries which the preponderance of the evidence satisfies you she actually sustained as the result of such of the four blows as you find the defendant struck her. She is, if entitled to recover at all, entitled to compensation for her pain and suffering, physical and mental, that resulted solely from the blows received. You will consider the nature and extent of her physical injuries resulting from the blows struck, such impairment of strength or mental power and such disfigurement as resulted from them, and also such injury to her feelings as she actually sustained through indignity or shame and humiliation consequent upon public exposure. You will not allow for any loss of time or services resulting from her injuries, or for any expense for physician's services, as these matters fall upon the husband and can only be recovered in a suit by him."

By the Court.—Judgment affirmed.

HEBER, Appellant, vs. ESTATE OF HEBER, Respondent.

April 22—May 11, 1909.

Action: Waiver of tort: Trover and conversion: Scope of remedy: Trial of questions of title: Executors and administrators: Right to prosecute actions: Pleading: Defects: Waiver: Claims: Value of services: Evidence: Conclusiveness: Gifts: Presumptions: Appeal and error: Findings, when disturbed: Payment as a defense: Necessity of pleading: Immaterial error.

1. An executor or administrator may in an appropriate case maintain an action for conversion, or he may waive the tort and sue on implied contract.
2. Questions of title can be tried in an action for conversion as well as in an action for replevin.
3. Courts should not deny to personal representatives of deceased persons the ordinary remedies that are open to other suitors.
4. Objection that a cause of action stated as a counterclaim is not pleadable as such, when apparent on the face of the answer, if not taken by demurrer is waived.
5. Where the evidence of the value of services rendered a decedent varies, although no evidence as to value is offered in behalf of the estate, the court is not thereby precluded from adopting the figures of witnesses who testified to the lowest scale of wages, and such finding is one supported by evidence and is not contrary to the uncontradicted evidence.
6. In the absence of a contract whereby a decedent agreed to pay his son for his services, a conveyance of land by the father to the son would be considered a gift; but the existence of a contract, together with the fact that at the time of the conveyance the decedent was largely in debt for such services, and the absence of evidence of payments otherwise made on such indebtedness, furnishes evidence sufficient to support a finding offsetting the value of the land against the son's services.
7. Findings of the trial court as to disputed facts not against the clear preponderance of the evidence will be affirmed.
8. Payment, to be available as a defense, ordinarily must be pleaded.
9. Under the provisions of sec. 2829, Stats. (1898), forbidding reversals for merely technical errors, error, if any, in allowing the value of land conveyed by the decedent to the claimant to be offset against the claim must be regarded as immaterial, where that issue, though not pleaded, was fully litigated.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

The appeal is from a judgment rendered on the claim filed by *Carl Heber* against the estate of his father, Charles Heber, deceased.

The court found (1) that for twenty years prior to the death of the decedent the claimant performed work and labor upon decedent's farm, living with him as a member of his family upon the expectation and understanding of both claimant and decedent that such services should be paid for at their reasonable and fair value upon or prior to the death of the decedent; (2) that for the first seventeen years of said period the services of said claimant were reasonably worth the sum of $100 per year over and above the board and clothing furnished by the decedent to the claimant, and that for the last three years of said period the services of the claimant were reasonably worth the sum of $200 per year over and above board and clothing; (3) that about three years before the death of the decedent he and his wife conveyed to the claimant forty acres of land which decedent had theretofore purchased for that purpose for the sum of $2,200, which sum was its reasonable and fair value; (4) that from the time of such purchase to the time of his death the decedent retained possession and control of said premises and enjoyed the use of the same with the consent of the claimant, and that the reasonable and fair value of the use of the said farm per year, above the taxes paid by decedent, was the sum of $100; (5) that after the death of decedent the claimant took and appropriated and converted to his own use the money left in the house by decedent at his death, and belonging to the estate, to the amount of $458.78; that claimant also sold grain belonging to said estate to the amount and value of $149.60 and retained the proceeds of such sale, and that the claimant also collected, received, and appropriated checks and milk money belonging to the estate to the amount and value of

$107.52; (6) that after the death of the decedent the claimant took, applied, and converted to his own use personal property belonging to the estate, consisting principally of live stock, to the amount and value of $504.

As conclusions of law the court found that the claimant should be allowed the sum of $2,300 for his services, and the sum of $400 for the use of the land of the claimant by decedent, making in all the sum of $2,700; and that he should be charged with the sum of $2,200 paid for the farm, and with the sum of $1,219.90 on account of the money and personal property belonging to the estate which was taken and appropriated by claimant to his own use, together with certain interest allowances. Upon these findings judgment was entered in favor of the executors of the estate and against the claimant for $925.94, damages, together with the costs of the proceeding, from which judgment the claimant appeals.

The appellant assigns as error the rulings of the court (1) in overruling the appellant's demurrer *ore tenus,* (2) in admitting testimony tending to support respondent's counterclaim, (3) in its findings of fact and conclusions of law, (4) in granting judgment in favor of the executors, (5) in allowing the value of the farm conveyed claimant to be offset against the value of his services, (6) in admitting testimony against appellant's objection, and (7) in excluding testimony offered by appellant.

For the appellant there was a brief by *Duffy & McCrory,* and oral argument by *J. H. McCrory.*

T. L. Doyle, for the respondent.

BARNES, J. 1. The executors of the estate of Charles Heber, deceased, filed objections in the county court to the allowance of the claim filed by his son, *Carl Heber.* They also interposed a counterclaim for the value of certain personal property alleged to have been owned by the decedent at the time of his death and thereafter converted by the claimant. The tort was expressly waived, and the executors stated in

their counterclaim that they would rely upon an implied contract to pay what the property was reasonably worth. The claimant by reply pleaded as one defense to the counterclaim that the pretended cause of action stated therein was not pleadable in the action. A demurrer *ore tenus* was interposed to the counterclaim for the reason stated, as well as for other reasons, and was overruled. Such ruling is assigned as error.

We do not deem it necessary to decide whether sec. 2656, Stats. (1898), would admit the matter set up in the objections and answer to be pleaded as a counterclaim. The answer stated facts sufficient to show a conversion, and we see no reason why executors may not in an appropriate case maintain an action for conversion. Neither is any reason apparent why they may not waive the tort and sue on implied contract. *Norden v. Jones,* 33 Wis. 600; *Walker v. Duncan,* 68 Wis. 624, 32 N. W. 689; *Western Assur. Co. v. Towle,* 65 Wis. 247, 26 N. W. 104; *Barth v. Graf,* 101 Wis. 27, 76 N. W. 1100.

We regard the position of appellant's counsel, that replevin is their only remedy, as untenable, and no authorities are cited to sustain such contention. Title can be tried in an action of conversion as well as in an action of replevin, and the courts should not deny to personal representatives of decedents the ordinary remedies that are open to other suitors, where property to which they have the legal title has been unlawfully converted. The proof is sufficient to sustain the finding that there was in fact a conversion.

The objection that the cause of action stated was not pleadable as a counterclaim, if well founded, was apparent on the face of the answer. No fact is disclosed by the reply that enlarges or illuminates the averments of the answer in this regard. The objection should have been taken by demurrer, and, not having been so taken, it was waived. Sec. 2660, Stats. (1898).

2. Several witnesses were sworn on behalf of claimant,

who testified to the prevailing wages paid farm laborers during the period claimant was working for his father, after the alleged agreement was made between them that he should be paid for his services. No evidence was offered upon the point by the respondent. The amount allowed the claimant for his services was considerably less than he would be entitled to receive had the court followed the evidence most favorable to the respondent and adopted the figures of the witness who testified to the lowest scale of wages. There was also evidence to the effect that the claimant "took a man's place," and that he was "a good average man." It is contended that the allowance made claimant by the court is wholly unsupported by any evidence in the case and is contrary to the uncontradicted evidence.

The court in reaching the conclusion arrived at was no doubt governed by the following considerations, among others: (1) Neither the claimant nor any other witness testified to what the services rendered were actually worth, and that was the real question in the case. (2) During the greater portion of the employment the farm consisted of a forty-acre tract, while the laborers concerning whom evidence was offered were employed on farms containing 160 acres or more. (3) Under the circumstances disclosed by the testimony the inference would be well-nigh irresistible, notwithstanding the evidence of the claimant, that he was furnished clothing, and perhaps spending and other moneys, from time to time by his father; and (4) that the work required of a son by his father would hardly be as exacting or as burdensome as that required of the ordinary farm laborer by his employer. We cannot say that the evidence referred to was conclusive upon the court, or that it was error for the court to refuse to adopt a scale of wages within the figures testified to, inasmuch as such testimony did not go directly to the value of the services rendered by the claimant, and in view of the other considerations enumerated.

3. It is contended that the court erred in offsetting

against the claim presented for services the value of forty acres of land conveyed by the decedent to the claimant about three years prior to the death of the former. In support of such contention it is urged that there is no evidence tending to show that the decedent ever intended that his son should be charged with the value of this land, and that the relation of the parties was such that the transaction should be treated as a gift, and not as a payment in whole or in part for services rendered.

In the absence of a contract whereby the decedent agreed to pay the claimant for his services the transfer could not be viewed in any other light than that it was intended as a gift. The existence of the contract of employment, however, places the transaction in an entirely different light. When the land was conveyed the decedent was indebted to the claimant in a large sum of money for a long period of services, and the evidence does not disclose that any payments had been made upon the indebtedness. It was natural enough that the son might want something to show for his work and that the father should desire to reduce the amount of the claim. Indeed, the circumstances tending to show that the father did not intend that the son should recover wages, and retain the forty-acre tract without accounting for its value, are quite persuasive. He had six other children, one of them a girl forty-three years of age, who was not strong in mind or body and who had always lived at home. To her he left a legacy of $1,000. The other children for the most part lived and worked at home until they became of age. To each of them he bequeathed $500. There is little doubt that the testator intended that the claimant should have all his property after the legacies bequeathed to the other children were paid. It seems equally clear that he intended that such legacies should be paid. The inventory value of decedent's property, plus the value of some property not included therein, was but $5,265.68. The sum of $200 was set apart for a monument. The amount of the bill presented against the estate by the

claimant was $7,581. The amount allowed claimant for his services and for the rental value of the forty-acre tract was $2,700. On the basis of this allowance, which it is claimed should be at least $1,000 more, the estate would fall over $1,100 short of paying the specific legacies provided for in the will, without taking into account funeral expenses or costs of administration. We think these facts and circumstances furnished ample warrant for the decisions of the county court and of the circuit court in making the offset, and that the rulings in this behalf were correct.

4. The court found that the claimant converted to his own use certain moneys which belonged to the decedent at the time of his death, and also certain other personal property, consisting of live stock and farm implements. It is urged that the court erred in not holding that at least a portion of this property belonged to the claimant, including the sum of $150 in money, which it is asserted was received upon the sale of a horse owned by claimant. Without discussing the evidence in detail bearing upon the subject, we do not think the findings of the trial court in reference to these disputed items are against the clear preponderance of the evidence. In fact, there is little in the record in the way of direct evidence as to ownership of the property, and the legitimate inferences to be drawn from established facts, we think, rather preponderate in favor of the findings. Besides, no attempt was made by the claimant to show that he did not acquire the property in dispute from his father, or that he paid anything for it except by way of work performed on the farm. The inference is well-nigh irresistible that if the title to the property was in the claimant he acquired it in much the same way that he acquired the forty-acre tract, and that the value of the property should be offset against his claim for the same reasons that justified a like offset being made in the case of the transfer of the land.

5. The executors made no reference in their answer to the forty-acre tract conveyed to the claimant, and it is urged

that the evidence was improperly received which showed the fact of conveyance and the value of the property. Payment is a defense that must ordinarily be pleaded in order to be available, and the transfer of the parcel of land was treated by both courts as a payment of the claim sued on, to the extent of its value. We find no statute or county court rule now in force requiring the personal representative of a decedent to interpose any such pleading in order to enable him to defeat recovery on a claim filed against the estate by showing payment. On the contrary, County Court Rule XIV expressly provides that "no claim shall be allowed, whether objected to or not, until the court is . . . satisfied that it is a just claim."

If it be conceded that the objection made was tenable and should have been sustained, it does not follow that reversible error has resulted. The question was litigated in the county court, and that court decided that the value of the land should be offset against the amount of the claim. It appears that the question was fully litigated in the circuit court. The appellant does not urge that he was taken by surprise or precluded from showing any material fact by reason of the failure to plead payment. It must have been manifest to the attorneys for the claimant that if the circuit court held the objection good it would have permitted an amendment of the pleading. Not to have done so would have been an abuse of discretion. It would be an obvious perversion of justice to impose an unjust burden of $2,200 upon this estate because a defense of payment which was litigated was not pleaded. If this court were to reverse the judgment for the reason urged, it would be its duty to direct that a new trial be had upon proper pleadings. As all of the facts were presented in the former trials that by any reasonable probability would be available on a new trial, the error complained of should be disregarded as immaterial under sec. 2829, Stats. (1898).

By the Court.—Judgment affirmed.

MILLIS and wife, Appellants, vs. THAYER, Executor, Respondent.

April 22—May 11, 1909.

Parent and child: Board of parent: Cause of action.

Where there is no express agreement by a father to pay for board furnished by his son, the latter cannot recover for such board.

APPEAL from a judgment of the circuit court for Walworth county: E. B. BELDEN, Circuit Judge. *Affirmed.*

J. H. Page, for the appellants.

Jas. G. Kestol, for the respondent *Thayer,* and *Edwin T. Cass,* guardian *ad litem* for *Benny Millis,* a minor.

WINSLOW, C. J. This is an action brought by husband and wife against the aged father of the husband to recover pay for board for about sixteen years, during which time the father admittedly lived with his son. The action was tried before a referee, who found that no agreement ever was made by the father to pay for his board, and therefore concluded that the complaint should be dismissed. Upon motion the circuit court confirmed the referee's report and entered judgment of dismissal, from which the plaintiffs appeal.

Examination of the record shows that there was ample evidence to sustain the finding that no express agreement to pay for the board furnished was ever made. This fact being established, there can be no recovery, under principles now very well settled. *Taylor v. Thieman,* 132 Wis. 38, 111 N. W. 229.

By the Court.—Judgment affirmed.

LICHTER, Respondent, vs. THIERS, by guardian *ad litem*, Appellant, and others, Respondents.

April 22—May 11, 1909.

Wills: Construction: Title devised: Codicil: "Other disposition:" Beneficiaries: Adopted children: Status: Remainder to "children" of devisee: Assignment of estate.

1. A will devising to a granddaughter of the testator a life estate, remainder to her children and descendants of such, in case there were children or their descendants at the time of her death, with a power in trust to terminate the contingent remainder in her discretion, by conveying the property to such children, or any of them, upon the happening of a specific event, and with a further power in trust to dispose of the remainder by will to whomsoever she might see fit, in case of her decease leaving no children or descendants of children, supplemented by a codicil providing that in case the granddaughter died childless or without descendants of children, and making no will or other *disposition* of the property, it should go to a nephew of testator's wife, indicates an intention of the testator that the property should not go to strangers of his blood, without choice on his part, and hence the title of the granddaughter is not enlarged by the codicil, while the power in respect to such title is restricted.
2. Sec. 4024, Stats. (1898), relating to the status of adopted children, while it may aid in discovering the meaning of a will which is obscure, cannot control or defeat its true construction.
3. Every person of mature years and of sound mind may make a will, and having made one, legally, the law, written or unwritten, cannot unmake it or change it by injecting into it something the testator did not intend.
4. Whether or not a will in favor of the children of any particular person means adopted children as well as children of the blood depends upon the intention of the testator, and adopted children may be included or excluded according to circumstances.
5. A will devising lands for life to a young unmarried granddaughter, remainder to her children or their descendants living at her death, followed in about one month by a codicil devising, in case the granddaughter died childless, the property to testator's relation by marriage, repels the idea that an adopted daughter of the granddaughter is a child within the calls of the will.

6. The assignment of an estate in the ordinary closing order assigning property according to the terms of a will does not operate to enlarge or abridge the rights of devisees who take by virtue of the will.

APPEAL from orders of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *One order reversed; the others affirmed.*

Action to quiet title.

The complaint was to this effect: June 26, 1885, John Lamb and Anna, his wife, conveyed to William Stanbridge a life estate in certain real estate, specified, of which said John Lamb was owner in fee. Subsequently both grantors died, said John Lamb leaving a will, executed July 20, 1885, with a codicil subsequently executed, which were duly proved and probated in the county court of Kenosha county, Wisconsin, in which county the land in question was located and the testator lived at the time of his death. Judgment was rendered in the probate proceedings assigning the land in accordance with the will, February 3, 1887. Except for the conveyance aforesaid, John Lamb owned the real estate at the time of his death. He disposed of the same by will at first, as follows:

"I give and devise to Mary Elizabeth Lamb Stanbridge all the residue and remainder of my estate wherever the same may be situate, to be by her used and enjoyed during her natural life, and upon her decease, the same to be equally divided among her living children and the heirs of those children which may have deceased by right of representation, if she shall have had such children or descendants of children and they shall be living at her death—with power as soon as the eldest child shall arrive at the age of twenty-one years—or at any time thereafter, to alienate and dispose of the whole or any part of the remainder over after the determination of the life estate, in favor of such child or children in equal or unequal parts in her discretion and thus divest the contingent remainders. And further in the discretion of said Mary Elizabeth Lamb Stanbridge, devisee of the life estate in the prem-

ises, in the contingency that she shall leave no child or descendants of children living at her death, to have power to dispose of the whole of such estate by will to any party or persons she may choose or prefer subject to the bequests hereinafter named."

He referred to the same matter in the codicil, thus:

"In the event of my granddaughter Mary Elizabeth Lamb Stanbridge dying childless or having no heirs by right of representation and making no will or other disposition of the property hereinafter referred to in this codicil, I give, devise and bequeath the property my said granddaughter had the power of disposing of by will under the above will but should have failed to do so, to my nephew (by marriage) now a resident gentleman farmer of Herefordshire, England, John Stephens or John Taylor Stephens, son of John Taylor Stephens, formerly of Shobden, Herefordshire, England, tanner and farmer, and Jane Stephens, his wife, *née* Jane Turner, of Kington, Herefordshire, aforesaid, said property to become the property of my said nephew John Stephens and his heirs in fee simple."

William Stanbridge and John Taylor Stephens are dead. Mary Elizabeth Lamb Stanbridge is now the wife of *Louis M. Thiers* and known as *Elizabeth S. Thiers.* On March 10, 1887, she, without covenants of warranty, deeded her interest in the property in question to William Stanbridge, who, October 7, 1905, by deed with full covenants, conveyed the land to plaintiff. The conveyance last made was intended by both parties thereto to pass full title in accordance with the terms of the instrument and the transaction was supported by an adequate consideration. Plaintiff has been in the actual occupancy of the land since the date of his deed. All instruments were duly recorded. Defendant *Elizabeth S. Thiers,* notwithstanding the facts aforesaid, claims to have power to devise the property in question, and defendant *Natalie Thiers* claims to have a vested remainder therein.

Defendant *Natalie Thiers,* by way of defense and counterclaim as well, answered to the effect: that she is an infant

represented by her guardian *ad litem;* that December 9, 1896, she became, and ever since has been, the duly adopted child of defendants *Elizabeth S. Thiers* and *Louis M. Thiers,* and, as regards property rights, has the status of a child of their blood under sec. 4024, Stats. (1898), and that she is their only child, and as such answers the call for a child of said *Elizabeth S. Thiers,* so far as whether the latter is childless or not affects the title to the real estate in question under the will of John Lamb, deceased.

The facts stated by the defendant *Natalie* were pleaded against her codefendants as well as against the plaintiff.

Defendants *Elizabeth S. Thiers* and *Louis M. Thiers* demurred to the complaint for insufficiency and likewise demurred to the adverse claim of their codefendant *Natalie.* Plaintiff demurred, for insufficiency, to the counterclaim. The first was overruled and the other two sustained.

There was an appeal by defendant *Natalie* from each of the adverse rulings as to her, and an appeal by her codefendants from the adverse ruling as to them.

For the plaintiff there was a brief by *Quarles, Spence & Quarles,* attorneys, and *Louis Quarles,* of counsel, and oral argument by *Louis Quarles.*

For the defendants *Elizabeth S.* and *Louis M. Thiers* there was a brief by *Peter Fisher.*

Thomas M. Kearney, guardian *ad litem,* for the defendant *Natalie Thiers.*

MARSHALL, J. It is plain that under the will of July 20, 1885, subject to some possible burdens which are immaterial to this case, John Lamb devised to his granddaughter, defendant *Elizabeth S. Thiers,* spoken of in such will as Mary Elizabeth Stanbridge, a life estate in the realty in question, after the termination of a preceding life estate conveyed to her father, William Stanbridge,—which is also immaterial to this case, the same having terminated by his death,—remain-

der over to her children and descendants of such, in case of there being any such children or descendants at the time of her death, with a power in trust to terminate the contingent remainder, in her discretion, by conveying the property to such children, or any of them, upon the happening of a specified event, and with a further power in trust to dispose of the remainder by will to whomsoever she might see fit, in case of her decease leaving no children or descendants of children.

The learned trial court regarded the codicil as having been intended to change the qualified title of *Elizabeth* to an absolute title and that such intention is indicated, clearly, by use of the words "and making no will or other *disposition* of the property," etc., the idea being that the primary testamentary idea was to vest power in *Elizabeth,* in case of her dying childless, to dispose of the property by will, whereas the codicil recognized a right to make disposition thereof generally.

We are unable to read the meaning suggested out of the codicil. The testator recognized the possibility of *Elizabeth* dying childless and leaving no descendants of children, a condition definitely provided for before, also the possibility of her having children and terminating the estate in remainder, in whole or in part, by a conveyance, or conveyances, as provided in the will, which disposition is quite clearly the event referred to by the words of the codicil, "or other disposition," and then guarded against the possibility of the property going to strangers of his blood, without choice on his part, for want of great-grandchildren or descendants thereof to take, by devising the remainder over to his nephew by marriage, residing in England, and his heirs. To so guard against such possibility seems to have been the sole purpose of making the codicil, and the intention in that regard is too clearly expressed to leave any reasonable doubt about it. The result is that the title of *Elizabeth* was not enlarged by the codicil, while power in respect to such title was materially restricted. So the de-

murrer of the defendants *Elizabeth S.* and *Louis M. Thiers* to the complaint should have been sustained.

Whether the demurrer of the *Thierses* to the cross-complaint of *Natalie Thiers* and that of the plaintiff to the same matter were properly sustained depends upon whether *Natalie,* as the child of her codefendants by adoption, is a child of *Elizabeth,* within the meaning of the will.

Counsel for appellants rely on sec. 4024, Stats. (1898), relating to the status of adopted children, as if such section were controlling instead of being, as regards a case of this sort, as it in fact is, at best a mere aid in construing. One must always look to the will to be construed to determine its meaning, having due regard to the existence of any statute or legal principle of the unwritten law or other circumstance which the testator may have had in mind at the time of expressing his testamentary wishes, which will aid in reading the language from the standpoint of the testator when he used it. As we have said, rules of law may aid in discovering the meaning of a will which is obscure, but they cannot control or defeat it, except in case of its being in violation of law so as to leave the property involved intestate. In other words, it is given to every person of mature years and of sound mind to make a will, and he having made one, legally, the law cannot unmake it or change it by injecting into it something the testator did not intend to put there. *In re Moran's Will,* 118 Wis. 177, 96 N. W. 367.

The statute upon which appellant so implicitly relies provides that an adopted child "shall be deemed for the purposes of inheritance and succession by such child . . . and all other legal consequences and incidents of the natural relation of parents and children the same to all intents and purposes as if the child had been born in lawful wedlock of such parents by adoption, excepting that such child shall not be capable of taking property expressly limited to the heirs of the body of such parents. . . ." Sec. 4024, Stats. (1898).

The law is the same, as here, in Maine, Alabama, Pennsylvania, Rhode Island, Indiana, Illinois, California, and many other states, and was also the same in Massachusetts originally, and is so now, as regards the question in hand. This court first discussed the general features of the statute at length in *Hole v. Robbins,* 53 Wis. 514, 10 N. W. 617. It was there held that the purpose thereof was to give the adopted child the same rights as against his adopted parents as to disposition of property by the law as those possessed by a child of the parents born in lawful wedlock, and to go no further as to property rights; that it does not change the law respecting disposition of property of intestate adopted children, or children of the blood of the adopted parents, by making the parents heirs of the adopted child, or such child an heir of his brothers or sisters by adoption of them as his heirs. The court referred to *Barnhizel v. Ferrell,* 47 Ind. 335; *Comm. v. Nancrede,* 32 Pa. St. 389; and *Schafer v. Eneu,* 54 Pa. St. 304, and recognized that the Massachusetts court in *Sewall v. Roberts,* 115 Mass. 262, 276, and *Burrage v. Briggs,* 120 Mass. 103, in principle, went somewhat further, but that later it was appreciated, apparently, that further legislation was necessary to give an adopted child a different status than the one indicated by this court, independently of a disposition of property by will.

The statute does not cut any figure as to an adopted child taking under the will of the adopted parents or under a will from another person to such parents with remainder over to children of such parents, except as it may explain what the testator had in mind by the use of the term "child" or "children."

We do not overlook *Parsons v. Parsons,* 101 Wis. 76, 80, 77 N. W. 147, to the effect that the statute should be liberally construed in favor of adopted children, or *Glascott v. Bragg,* 111 Wis. 605, 610, 87 N. W. 853, to the effect that the adoption of a child has the same effect upon a will made by the

parent prior thereto as the subsequent birth of a child. The latter case has nothing to do with the right of an adopted child to take under a will of the parent where he is not mentioned therein or thought of by the testator in the preparation of the instrument, but deals with his right according to the presumed intention of the parent that the property shall be regarded as intestate respecting the child by adoption, nothing appearing efficiently to the contrary. The statute does not, necessarily, affect the disposition of property by will of a person having an adopted child or by a will in favor of the parent. Here it must be remembered, if the adopted child takes at all, it is not under the adopted parent by inheritance or succession or even by will of such parent, but under the will of such parent's father, John Lamb.

Now whether a will in favor of the children of any particular person means adopted children as well as children of the blood of such person, depends upon just what the testator intended, and that may include or exclude adopted children according to circumstances. There is no very arbitrary rule on the subject, except that the testator's intent must govern.

The authorities are not entirely in harmony. The following, in addition to those heretofore referred to, bear more or less helpfully on the question: *Palairet's Appeal,* 67 Pa. St. 479; *Warren v. Prescott,* 84 Me. 483, 24 Atl. 948; *Lyon v. Lyon,* 88 Me. 395, 34 Atl. 180; *Virgin v. Marwick,* 97 Me. 578, 55 Atl. 520; *Woodcock's Appeal,* 103 Me. 214, 68 Atl. 821; *Russell v. Russell,* 84 Ala. 48, 3 South. 900; *Butterfield v. Sawyer,* 187 Ill. 598, 58 N. E. 602; *Wyeth v. Stone,* 144 Mass. 441, 11 N. E. 729; *Blodgett v. Stowell,* 189 Mass. 142, 75 N. E. 138; *Bray v. Miles,* 23 Ind. App. 432, 54 N. E. 446, 55 N. E. 510; *Hartwell v. Tefft,* 19 R. I. 644, 35 Atl. 882; *Olney, for an opinion,* 27 R. I. 495, 63 Atl. 956.

All such authorities, and many others that might be referred to, are in harmony with the statement in *Russell v. Russell,* 84 Ala. 48, 3 South. 900, that the statute, so far as conferring rights is concerned, in the field under discussion,

deals with intestacy, and that otherwise it creates a condition bearing more or less according to circumstances upon the meaning of the words "legal heir," "children," "issue," and the like, in wills. We will say in passing, though it does not have particularly to do with the questions here, that *Barnhizel v. Ferrell,* 47 Ind. 335, mainly relied on by this court in *Hole v. Robbins,* 53 Wis. 514, 10 N. W. 617, was overruled in *Davis v. Krug,* 95 Ind. 1, 10, and *Humphries v. Davis,* 100 Ind. 274, 279.

The following are directly in point here:

In a devise to a married woman, remainder over to her children, an adopted child does not take in remainder in the absence of some clear indication that such was intended, by circumstances other than the mere use of the term "children." *Schafer v. Eneu,* 54 Pa. St. 304.

In a devise to a child of the testator's own blood, remainder over to a child or children of that child, if any, otherwise to others of the testator's blood, the word "child" or "children" of the first taker does not include an adopted child. *Woodcock's Appeal,* 103 Me. 214, 68 Atl. 821.

A devise to a trustee for the benefit of the testator's wife during life, remainder over to his adopted daughter, contingent upon her predeceasing the wife leaving no issue, in which case remainder to the heirs at law of the wife, an adopted child of the adopted daughter, left by her on her predeceasing the wife, does not satisfy the call of the will for issue of such adopted daughter so as to intercept the passing of the property to such heirs at law. *Wyeth v. Stone,* 144 Mass. 441, 11 N. E. 729.

In a will devising and bequeathing property in trust for the benefit of the testator's son for life, remainder in part over to his issue in case of his leaving such, otherwise to his heirs by right of representation, a child of the son by adoption, thirty-six years after the making of the will, does not come under the call of the will for issue of the son. *Blodgett v. Stowell,* 189 Mass. 142, 75 N. E. 729.

The last two cases are significantly in point since they are from Massachusetts, the state from which it is supposed our statute was borrowed, and were decided long subsequent to

Sewall v. Roberts, 115 Mass. 262, upon which counsel for appellant rely with confidence.

In some of the authorities referred to, particularly *Woodcock's Appeal,* the pretty arbitrary rule of construction was adopted that in all cases where "one makes provision for his own child or children by that designation he should be held to have included an adopted child," but where one makes provision "for 'a child or children' of some other person than the testator, an adopted child is not included unless other language in the will makes it clear that he was intended to be included. . . . In making a devise over from his own children to their 'child or children' there is a presumption that the testator intended 'child or children' of his own blood. . . ."

We do not need to adopt or reject that rule for the purposes of this case. Where the first taker or parent named has already an adopted child or such and other children, or has an adopted child and the time of life is past for bearing children, the inference might be that the adopted child was intended to be the beneficiary, or one of them, while if the parent, present or prospective, mentioned, is a young person who would ordinarily be expected to have children, the inference might be the other way.

Here the fact that *Elizabeth* was quite a young unmarried girl at the time the will was made, and at the time the testator died, rather repels the idea that her grandfather, in providing for the remainder after the termination of her life estate should go over to her child or children, if living, thought of great-grandchildren in any other sense than issue of her blood. That is much emphasized by execution of the codicil after the lapse of only about one month, making provision, in case of the granddaughter dying childless, for the property to go to a relative of his, by marriage, in England, instead of her being left free to dispose of the same by will to some person in whom he had no interest and who had no claims upon his bounty. Thus the construction of the will by the trial court we find correct, and the demurrers to the

counterclaim to have been properly sustained. However, we recognize that the claim of the appellant is not entirely without authority to support it in the cases cited, but the great weight of authority and the better reasoning, in our opinion, support our conclusion.

The assignment of the estate in the probate proceeding to Mary Elizabeth Stanbridge we do not consider cuts any figure in the case. It was the ordinary closing order assigning the property according to the terms of the will.

The result leaves the rights of all contingent beneficiaries under the will, who did not appear, unaffected by the determination appealed from. The interest of the plaintiff in the property is limited to just what was conveyed to him, as herein indicated.

By the Court.—The order overruling the demurrer to the complaint is reversed and the court below is directed to sustain such demurrer. The orders sustaining the demurrers to the counterclaim are affirmed, and the cause is remanded for further proceedings according to law.

KLABUNDE, Appellant, vs. CASPER, Respondent.

April 23—May 11, 1909.

Deeds: Death of grantor: Delivery to third person for grantee: Sufficiency.

The delivery of a deed to a third person, with instructions to give it to the grantee after the grantor's death, is a valid delivery, if it was the grantor's intention to presently pass the title.

APPEAL from a judgment of the municipal court of Racine county: WM. SMIEDING, JR., Judge. *Affirmed.*

This is an action to quiet title. The plaintiff bases his claim to the premises upon the fact that he is the husband of Martha Lemke Klabunde, deceased, who owned the premises

at the time of her death, and that she died without issue. The defendant's claim is based on a deed from Martha Lemke, which plaintiff alleges was never delivered. This is an appeal from the judgment adjudging that the plaintiff has no right, title, interest, or claim in or to the premises in question and that the defendant is the owner and is entitled to the possession of the premises.

For the appellant there was a brief by *Simmons, Nelson & Walker,* attorneys, and oral argument by *John B. Simmons* and *M. B. Walker.*

For the respondent there was a brief by *Kearney, Thompson & Myers,* and oral argument by *W. D. Thompson.*

SIEBECKER, J. Martha Lemke married *Frank Klabunde* in 1903. At the time of her marriage she was the owner of the premises in question. In December, 1906, she directed her sister, Mrs. Best, who had come to live with her and to nurse and care for her during her illness from tuberculosis, to get writing materials ready for the notary, a Mr. Schlegel, whom she wished to draw some papers to dispose of her property. The notary was called in and directed to prepare a deed conveying the premises in question to the defendant. The deed was prepared, signed, witnessed, and acknowledged, the grantor signing the deed with the name "Mrs. Martha Lemke"—Martha Lemke having been her name before her last marriage and being the name of the grantee in the deed used by the notary for obtaining the description. The grantor was raised in the bed and supported while she signed the deed. The notary testified that after signing and folding the paper he left it on the grantor's bed. There was evidence that the notary advised that the deed be handed to a third party for delivery to the grantee after the death of the grantor. Mrs. Best testified that after the departure of the notary the grantor handed the deed to her and directed her to hold it and to deliver it to the grantee after her death. In September, 1907, Mrs. Klabunde, while feeling very ill, di-

rected her sister, Mrs. Best, to bring to her for examination, from a trunk where they had been placed and kept by Mrs. Best, a bundle of papers, consisting of certificates of deposit, insurance policies, etc. Among the papers was the deed in question. Mrs. Klabunde went through the papers, and, when she had read over the deed, stated that it was all right, that it was the way she wanted it, and she then handed it to Mrs. Best to keep, at the same time directing her to give it to the grantee when she died. She also gave Mrs. Best the rest of the papers and directed her how to dispose of them. She never thereafter had the deed in question, nor did she do anything to exercise dominion over it. She died March 14, 1908. After Mrs. Klabunde's death the deed was delivered to the grantee by Mrs. Best and it was subsequently recorded. The grantee has taken possession of the premises and excludes the plaintiff therefrom.

The trial court found, among other findings:

"That the said grantor, Martha Klabunde, at the time of the delivery of said deed to Mary Best in December, 1906, intended that the title to said premises should immediately vest in the defendant, subject to the reservation in said deed contained. That at the time of said delivery in December, 1906, the said grantor delivered said deed without reservation or right of recall to the said Mary Best."

From an examination of the record we are convinced that the findings of the court have support in the evidence and cannot be reversed on this appeal. It is not deemed necessary to restate the evidential facts to this effect. It is sufficiently established that the grantor parted with the possession of the deed with the intention of presently passing the title to the grantee. Under the facts proven and found by the court the defendant became vested with the title to the premises under the deed and is entitled to a judgment establishing it in her. See *Bates v. Winters,* 138 Wis. 673, 120 N. W. 498.

We find no error in the record.

By the Court.—Judgment affirmed.

TOBIN, Appellant, vs. TOBIN, Administratrix, and another, Respondents.

April 23—May 11, 1909.

Gifts: Requisites: Intent: Delivery: Acceptance: Mortgages: Nature: Assignment: Payment: Extinguishment: Trusts and trustees: Resulting trusts: Statutes: Construction: "Grant."

1. Evidence that A. never gave or intended to give B. a note and mortgage taken in B.'s name, that B. never knew of the execution thereof, and that there was no acceptance thereof on the part of B., is insufficient to establish a gift from A. to B.
2. In Wisconsin a mortgage merely gives a lien upon the land mortgaged for the money secured thereby; passes as an incident upon transfer of the note; when assigned separate from the note does not transfer the note, unless the note is in fact delivered; and is extinguished by the payment of the debt it is given to secure.
3. A mortgage is not a "grant" within the meaning of that word as used in sec. 2077, Stats. (1898), providing that no trust arises in favor of one who pays the consideration for a "grant" made in favor of another. *Cerncy v. Pawlot*, 66 Wis. 262, and *Meier v. Bell*, 119 Wis. 482, in so far as they hold that sec. 2077 applies to mortgages, overruled.
4. Sec. 2077, Stats. (1898), applies exclusively to real property, and the "grant" therein referred to means an absolute conveyance of the land by which the title is vested in the grantee named.

APPEAL from a judgment of the circuit court for Walworth county: E. B. BELDEN, Circuit Judge. *Reversed.*

This is an appeal from a judgment affirming the judgment of the county court of Walworth county setting aside an order previously made by that county court appointing a special administrator in the estate of John Tobin, deceased, for the purpose of assigning a note and mortgage in the name of John Tobin to *Joseph Tobin,* on the ground that such order was procured by fraud and that the county court had no jurisdiction. In 1901 *Joseph Tobin* resided in Whitewater, Wisconsin, and made a loan to one James Brady of $4,800, and

caused the note and mortgage to be made to John Tobin, his son. The mortgage was in the usual form and ran to John Tobin, his heirs and assigns. *Joseph Tobin* always held the note and caused the mortgage to be recorded. In 1903 John Tobin, who then resided in Pueblo, Colorado, returned to Whitewater, Wisconsin, and died there a short time after his arrival. Shortly after his death a petition was presented to the county court of Walworth county by *Joseph Tobin* setting up that John died when a resident of Walworth county, leaving him surviving his widow, *Marie,* and a minor son, Cyril, as his only heirs at law; that Cyril resided with his mother at Whitewater, Wisconsin; that deceased left no debts unpaid; that *Joseph Tobin* had loaned to James Brady the sum of $4,800, and that the note and mortgage had been taken in the name of John Tobin, who never had any interest therein; and that the same belonged to *Joseph;* and prayed for an order appointing a special administrator for the purpose of assigning the note and mortgage to *Joseph Tobin.* The widow of John Tobin joined in the petition, and his minor son was represented by a guardian *ad litem.* The court appointed a special administrator in accordance with the prayer of the petition, and assigned the note and mortgage to *Joseph Tobin* October 5, 1903, in accordance with sec. 3813*a,* Stats. (1898). Thereafter *Marie Tobin,* widow of John Tobin, petitioned the county court of Pueblo county, Colorado, for the appointment of an administrator on the estate of John Tobin, deceased, and on November 13, 1906, she was appointed administratrix. On March 16, 1907, *Marie Tobin* petitioned the county court of Walworth county, Wisconsin, setting forth the previous proceedings had in said county, her appointment as administratrix, that she was the widow of John Tobin, deceased, and that she and the minor child, Cyril, were the only heirs at law; that John Tobin was a resident of Pueblo, Colorado, at the time of his death; that she was also a resident of Pueblo at the time she joined in the petition

of *Joseph Tobin,* and that Cyril was not in Wisconsin at that time; that the note and mortgage were the property of John Tobin when he died; that her assent to the petition of *Joseph Tobin* had been obtained by false representations; and that she did not know the contents thereof, and prayed that the order appointing the special administrator and all proceedings thereunder be set aside and *Joseph Tobin* be required to account. On this petition the county court ordered service of notice of hearing upon *Joseph Tobin* and the guardian *ad litem* of Cyril, which was made. Hearing was had and judgment entered for the petitioner, *Marie Tobin,* in accordance with the prayer of the petition. An appeal was taken by *Joseph Tobin* to the circuit court, and an answer filed by him setting up that there was no delivery to or acceptance by John Tobin and no intent to deliver by *Joseph,* and further alleging ownership of the note and mortgage in *Joseph Tobin.* The matter was tried, and the court found, among other things, that on the 12th day of March, 1901, *Joseph Tobin* made a loan of $4,800 to James Brady, taking his promissory note secured by mortgage of even date; that the money was the property of *Joseph Tobin;* that the note and mortgage have remained in the physical possession of *Joseph Tobin* since their execution, except during such time as the mortgage was with the register of deeds of Walworth county; that the note and mortgage were taken in the name of John Tobin, deceased, and stood in his name at the time of his death; and that such mortgage ran to John Tobin and his heirs and assigns; that during the lifetime of John Tobin, *Joseph Tobin* collected the interest on the note for the years 1902 and 1903 and remitted the same to John Tobin, who accepted it; that after the death of John Tobin, *Joseph Tobin* collected the interest for the years 1904 and 1905 and has never accounted for it to the estate of John Tobin, deceased; that John Tobin never knew of the existence of the note and mortgage in his lifetime and never claimed any title thereto; that *Marie Tobin* was not advised of the facts in the matter

at the time she joined in the petition of *Joseph Tobin,* and was not informed that the title to the note and mortgage had vested in her husband and remained in him at the time of his death; and that she was misled by the concealment and misrepresentations of the facts, and the legal effect of the facts and proceedings had in the county court.

The court found as conclusions of law that the order of the county court vacating its former order appointing a special administrator for the purposes specified was proper, and that when *Joseph Tobin* recorded the mortgage the title thereto and the debt thereby secured passed beyond his recall or control, and that the title to the note and mortgage vested in John Tobin at the time they were executed and delivered by Brady; that the recording of the mortgage was a sufficient delivery and acceptance by John Tobin; that *Marie Tobin* was not estopped from bringing the proceedings; that the proceedings upon petition of *Joseph Tobin* were a constructive fraud upon *Marie Tobin;* that the minor son, Cyril Tobin, was not bound by the proceedings, and that the prayer of the petition of *Marie Tobin* should be granted, and ordered judgment as follows: (1) Affirming the order of the county court; (2) requiring *Joseph Tobin* within thirty days to transfer and deliver the note and mortgage to *Marie Tobin* as administratrix; (3) requiring him to pay her in said capacity the sum of $480, being two years' interest unaccounted for; (4) requiring him to pay all costs and disbursements of this action. Judgment was entered accordingly.

For the appellant there was a brief by *Edwin T. Cass* and *Wallace Ingalls,* attorneys, and *Sanborn & Blake,* of counsel, and a supplemental brief by *Edwin T. Cass* and *Wallace Ingalls,* and oral argument by *Mr. John B. Sanborn, Mr. Ingalls,* and *Mr. Cass.*

W. C. Leitsch, for the respondents.

KERWIN, J. There is considerable discussion in the briefs on both sides respecting the jurisdiction of the county court

to make the order assigning the note and mortgage referred to in the statement of facts to *Joseph Tobin,* and also on the question whether a case of fraud was made which would justify the county court in setting aside the order on the application of *Marie Tobin* as administratrix. These questions, however, become material only in the event that it be determined that the note and mortgage in question were the property of John Tobin. The controlling question is whether John Tobin was the owner of the note and mortgage. It is established by the evidence that *Joseph* never gave or intended to give the note and mortgage to John and that John never knew of the execution thereof, and that there was no acceptance on the part of John; therefore there was no gift. *Beaver v. Beaver,* 117 N. Y. 421, 22 N. E. 940; *Scott v. Berkshire Co. Sav. Bank,* 140 Mass. 157, 2 N. E. 925; *Thomas v. Thomas,* 107 Mo. 459, 18 S. W. 27; *Pope v. Burlington Sav. Bank,* 56 Vt. 284; *Sherman v. New Bedford F. C. Sav. Bank,* 138 Mass. 581. The theory of the court below was that the taking of the note and mortgage in the name of John Tobin and recording the mortgage by *Joseph* vested title to the note and mortgage in John, under the provisions of sec. 2077, Stats. (1898), and therefore no right or interest remained in *Joseph.* This is the position of counsel for respondents to support title to the note and mortgage in John Tobin and his estate, and in support of this contention he quotes sec. 2077, Stats. (1898):

"When a grant for a valuable consideration shall be made to one person and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment is made; but the title shall vest in the person named as the alienee in such conveyance, subject only to the provisions of the next section."

The question, therefore, arises whether a note secured by mortgage on real estate is within sec. 2077, Stats. (1898). A mortgage in this state merely gives a lien upon the land

mortgaged for the sum of money secured thereby. *Brinkman v. Jones,* 44 Wis. 498. A mortgage securing a promissory note passes as an incident upon transfer of the note. *Kelley v. Whitney,* 45 Wis. 110. And an assignment of the mortgage alone and separate from the note it was given to secure will not transfer the note unless it is in fact delivered. *Wilson v. Carpenter,* 17 Wis. 512; *Hitchcock v. Merrick,* 18 Wis. 357. A mortgage is extinguished by payment of the debt it was given to secure. *Fisher v. Otis,* 3 Pin. 78. It therefore follows that the debt secured by the mortgage is the principal thing and the mortgage the incident. Hence a mortgage given to secure a note is not a "grant" within the meaning of the statute referred to, unless it can be said that the statute applies to personal property. We think our statute (sec. 2077) applies exclusively to real estate. It is found in the chapter on Uses and Trusts Concerning Real Estate, and is unmistakably confined to that class of property. Our statute is a substantial copy of the New York statute, from which it was taken. In New York this statute has been held to apply to real estate only, and is not controlling in transactions involving personal property. *Fairchild v. Fairchild,* 64 N. Y. 471; *Day v. Roth,* 18 N. Y. 448; *Gilman v. McArdle,* 99 N. Y. 451, 2 N. E. 464; Perry, Trusts, § 86; *Carr v. Carr,* 52 N. Y. 251. The "grant" referred to in the statute is an absolute grant of the land by which the title to the real estate vests in the grantee named in the deed. *McCartney v. Bostwick,* 32 N. Y. 53; *Carr v. Carr, supra.* The note and mortgage being the property of *Joseph Tobin,* and never having passed to John Tobin, it is unnecessary to consider the questions discussed respecting the regularity of the proceedings appointing the special administrator and assigning the note and mortgage to *Joseph Tobin.* The property was his, and whether the proceedings were regular or not the respondents were not prejudiced thereby. Respondents rely upon *Cerney v. Pawlot,* 66 Wis. 262, 28 N. W. 183, and

Meier v. Bell, 119 Wis. 482, 97 N. W. 186. These cases appear to hold, as contended by respondents, that sec. 2077, Stats. (1898), applies to mortgages, but it seems the point was not necessary to uphold the conclusion of the court in either case. In *Cerney v. Pawlot, supra,* the case turned on whether there had been a delivery of the note and mortgage and acceptance. In *Meier v. Bell, supra,* the action was for reformation, and it was held that the evidence was not sufficient to warrant the court in adjudging reformation. But so far as these cases hold that sec. 2077 applies to mortgages they must be regarded overruled.

By the Court.—The judgment of the court below is reversed, and the cause remanded with directions to the circuit court to reverse the judgment of the county court.

ESTATE OF CLEARY: CLEARY, Appellant, vs. CLEARY, Respondent.

April 23—May 11, 1909.

Alteration of instruments: Evidence: Appeal and error: Review: Questions of fact: Trial by court: Findings, when disturbed: Admission of incompetent evidence: Harmless error.

1. On conflicting evidence the trial court having found that a written instrument was altered in a material particular after its execution, such finding is affirmed, the appellate court being unable to say that the finding is contrary to the weight of evidence.
2. On a trial by the court without a jury, there being competent evidence to sustain the court's findings, the admission of incompetent evidence is not ground for reversal.

APPEAL from a judgment of the circuit court for Walworth county: GEORGE GRIMM, Judge. *Affirmed.*

The appeal is from a judgment of the circuit court for Walworth county reversing a judgment of the county court

of that county made on final settlement of the administrator's account distributing and assigning the estate of Michael Cleary.

D. B. Barnes and *John B. Simmons,* for the appellant, cited, among other cases, *Brader v. Brader,* 110 Wis. 423, 85 N. W. 681; *Jackman v. Inman,* 134 Wis. 297, 114 N. W. 489; *Hagan v. McDermott,* 134 Wis. 490, 115 N. W. 138; *Howland v. Blake,* 97 U. S. 624; *Komp v. State,* 129 Wis. 20, 108 N. W. 46.

For the respondent there was a brief by *Olin & Butler,* and oral argument by *J. M. Olin.*

Among other references upon the part of the respondent were the following: *Carroll v. Bohan,* 43 Wis. 218; *Bradley v. Dells L. Co.* 105 Wis. 245, 81 N. W. 394; *Cox v. Palmer,* 3 Fed. 16; *Abbott v. Dow,* 133 Wis. 533, 113 N. W. 960; *Pym v. Pym,* 118 Wis. 662, 96 N. W. 429; *Rawson v. Milwaukee Mut. L. Ins. Co.* 115 Wis. 641, 92 N. W. 878; *Dumke v. Puhlman,* 62 Wis. 18, 21 N. W. 820; *Wolf v. Theresa V. Mut. F. Ins. Co.* 115 Wis. 402, 91 N. W. 1014; *Schultz v. Culbertson,* 125 Wis. 169, 103 N. W. 234; *Wollman v. Ruehle,* 104 Wis. 603, 80 N. W. 919.

TIMLIN, J. Michael Cleary, of Walworth county, died on April 16, 1906, leaving surviving him two sons, *John Cleary* and *Patrick Cleary,* his only heirs at law, and leaving an estate for distribution variously estimated at from $9,000 to $12,000. February 25, 1902, Michael Cleary conveyed by warranty deed to *Patrick Cleary* a certain farm of a value estimated by them at $3,500, upon which *Patrick Cleary* at the time raised by mortgage on said farm and paid to Michael Cleary the sum of $1,500. At this time and as part of this transaction *Patrick Cleary* executed and delivered to Michael Cleary an instrument as follows:

"Delavan, Wis., February 25, 1902. Know all men by these presents, that I, *Patrick Cleary,* have this day received

of my father, Michael Cleary, a deed to certain real estate situated in the county of Walworth, and the state of Wisconsin, valued at thirty-five hundred dollars ($3,500). I have paid him fifteen hundred dollars in cash. The balance of said purchase money, to wit, two thousand dollars ($2,000), being an advancement to me by my father on any share due me on settlement of my father's estate."

The words "and in full of any interest in said estate" follow in regular order over the signature and seal of *Patrick Cleary*. *Patrick Cleary* contended that these words were written in without his knowledge or consent after he executed and delivered the instrument, and his brother, *John Cleary*, contended that the words last quoted were part of said instrument at the time of its execution by *Patrick Cleary*. The words "and in full of any interest in said estate" appear on the face of the writing to have been added at some time after completion of the instrument. The period after "estate" and preceding these words was changed to a comma, and these words are apparently made with a different typewriter ribbon than the preceding part of the instrument. On the back of the instrument is an acknowledgment by *Patrick Cleary* before a notary public on February 25, 1902. The circuit court, reversing the order of the probate court, finally distributing the estate of Michael Cleary, deceased, charged *Patrick Cleary* merely with an advancement of $2,000, and subject to this assigned the residue of Michael Cleary's estate equally between *John* and *Patrick Cleary*. From this judgment an appeal is taken to this court.

On the trial the instrument in question was offered and received in evidence against the objection of *Patrick Cleary*, and it is contended by respondent that the instrument, showing on its face an alteration, was not properly received in evidence without explanation of that alteration. No explanation was attempted on examination in chief of the administrator, who produced the instrument and identified it, and who is the same person who as notary took the acknowl-

edgment on the back. On cross-examination of this witness, when asked whether or not he put those words in the instrument, he answered:

"It would be my impression that I did not. I won't swear that I did not. I infer it from the instrument. My recollection don't guide me, and I draw that inference from the color of the ribbon. . . . I don't think I said I did not add that language, but my impression. I meant to convey the idea that there are certain things that make me think I did do it, and other things that are so clearly contrary to that idea that I don't think I did write it. There are indications of a difference in that language following the word 'estate,' and am unable to state whether or not that language was there at the time of the execution of the instrument."

The instrument was admitted in evidence, but the objection to its receipt was not renewed after this cross-examination. Thereupon counsel for *Patrick Cleary* undertook to impeach the instrument by attempting to show that these words were not part of the instrument at the time of its execution by *Patrick Cleary*.

It would answer no useful purpose to detail the evidence on the part of *Patrick Cleary* offered for this purpose. Briefly, it consisted of evidence to the effect that *Patrick Cleary* and Michael Cleary consulted a young lawyer named Morrissey, who drafted a contract containing these disputed words. Michael Cleary objected to the draft on this ground, and it was on the same day of and immediately prior to its execution corrected by striking out these words and rewritten without these words and delivered to Michael and *Patrick Cleary*, who at once took it over to the notary for the purpose of executing it. *Patrick Cleary* testifies that these words were not part of the instrument at the time he signed the same, nor were they added with his knowledge or consent. The instrument was not recorded until March 14, 1902, but as recorded it contained these words. He contends that the instrument was altered in the meantime by the addition of

the words in question. Other instruments executed on this same typewriter were offered for purposes of comparison, and testimony was offered tending to show that the typewriter ribbon was changed some time after February 25, 1902, or at least after writing the note of *Patrick Cleary*. The acknowledgment on the back of the instrument in question in the appearance of the ink and writing resembles the disputed words, but the experts are at variance on this point. No direct proof other than the instrument itself was offered tending to show that these words were part of the instrument at the time of its execution by *Patrick Cleary*, but various circumstances are relied on to establish that fact.

The circuit court found on the evidence that the instrument in question was executed by *Patrick Cleary* in the form first above written ending with the words "on settlement of my father's estate," and that the subsequent addition of the said disputed words was without the knowledge, consent, or authority of the said *Patrick Cleary*, and constituted a material alteration of said instrument, making it express a substantially different agreement.

We are convinced that under all the evidence this was a question of fact found by the circuit court in favor of the respondent upon conflicting evidence and that we should not disturb that finding. This is not a case where an instrument absolutely fair on its face is sought to be impeached by parol evidence, nor a case where one seeks to defeat recovery upon an admitted covenant in a written instrument because the instrument was in other material respects fraudulently altered; but it is a case where the effective covenant upon which recovery or estoppel is sought appears from the instrument itself to have been added after its completion and in a different ink, but it does not clearly appear from the instrument itself whether this covenant was added before or after the execution of the instrument. This latter was a question open to legal controversy. It is not probable, nor does the court below find, that the notary wrongfully added the disputed

words, but that this was the result rather of mistake with reference to what *Patrick* had agreed to. Granting that the burden of proof was upon respondent to establish by clear and satisfactory evidence that the words in question were not on the instrument when executed, we find ourselves unable to say that the findings of the court below are contrary to the weight of evidence. 2 Cyc. 251; *North v. Henneberry,* 44 Wis. 306; *Page v. Danaher,* 43 Wis. 221; *Linde v. Gudden,* 109 Wis. 326, 85 N. W. 323.

Some complaint is made respecting the admission of incompetent evidence; but as the case was tried by the court without a jury, and there is competent evidence to support the finding, the admission of such incompetent evidence, if any, is not ground for reversal.

By the Court.—The judgment of the circuit court is affirmed.

JIRACHEK, Respondent, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.

April 24—May 11, 1909.

Street railways: Negligence: Starting car while passenger is alighting: Sufficiency of special verdict: Finding as to negligence: Trial: Instructions to jury: Credibility of witnesses: Requests embraced in charge: Instructions applicable to the evidence: Burden of proof as to damages.

1. A street-car conductor who starts his car when he knows a passenger is in the act of alighting is guilty of negligence as matter of law.
2. Evidence that a street-car conductor was on the rear platform as a passenger was alighting and saw the passenger in the act, and that the conductor rang the bell for the car to start, in connection with findings otherwise sufficient to charge the street-car company with negligence, renders unnecessary a formal finding of negligence.
3. Where a witness who had been examined under sec. 4096, Stats. (1898), on cross-examination on the trial admitted the making of some statements on his examination contradictory to those

made on the trial, an instruction: "You should not consider the evidence of the [witness] given at any time prior to the trial of this action, *in so far* only as to determine the credibility of the [witness's] evidence given here, and the weight to be given to his evidence," while inaccurate in that the word "except" should properly have been inserted in place of "in so far," is *held* not to have misled the jury.

4. It is not error to refuse a correct requested instruction where its substance is embraced in the charge as given.
5. Requested instructions, not applicable to the evidence given on the trial, are properly refused.
6. While a correct requested instruction that the burden of proof to show his damages is upon the plaintiff should properly have been given, its omission is not prejudicial, where the court fully and explicitly charged the jury to allow only such damages as were proven by the evidence to a reasonable certainty to have been sustained as the natural and probable consequence of the injury.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

The plaintiff, while stepping from one of defendant's street cars in the city of Milwaukee on the 30th of March, 1907, fell to the pavement and was severely injured. He claimed that the car started while he was in the act of alighting, thus throwing him to the ground, while on the other hand it was claimed that the plaintiff attempted to get off the car before it stopped. This was practically the sole issue in the case. The jury returned a special verdict, by which they found: (1) That the plaintiff was injured while alighting from the car; (2) that the car started while he was alighting and thus caused him to fall to the pavement; (3) that the starting of the car was the proximate cause of his injury; (4) that plaintiff did not alight before the car had stopped; (5) that the plaintiff was not guilty of contributory negligence; and (6) that plaintiff's damages were $3,000. The defendant moved to change the answers to the second and third questions and for judgment on the verdict as amended; also for judgment notwithstanding the verdict; also that the verdict be set aside and a new trial be granted for all the usual rea-

sons. These motions being overruled and judgment entered for the plaintiff on the verdict, the defendant appeals.

The cause was submitted for the appellant on the brief of *Clarke M. Rosecrantz.*

O. W. Bow, for the respondent.

WINSLOW, C. J. Appellant's first contention is that there was no evidence showing that plaintiff was alighting from the car after it had stopped, but rather that the only fair inference is that the plaintiff attempted to alight before the car had quite stopped. This contention cannot be sustained. It is true that the plaintiff, who testified through an interpreter, is not as definite in his testimony on the subject as might be desired, but he says that the car stopped at Eleventh avenue, where he wished to get off. In answer to a later question as to how he got hurt he said that he took hold of the rail of the car with his left hand and was stepping off the car, and at that moment the car started forward and he was thrown to the ground and the car went along. In addition to this the conductor of the car testified directly that he was on the back platform and saw the plaintiff when he got off and that the car was then standing still.

It is next contended that the verdict is insufficient because there is no specific finding of negligence. The verdict finds that the plaintiff alighted after the car had stopped, that the car started while he was alighting and threw him to the pavement, and that the starting of the car was the proximate cause of plaintiff's injury. There is no finding that the act of starting the car was negligence, and the question might be a serious one if the facts as to the starting of the car were in dispute. There is no dispute, however, as to the fact that the conductor was on the rear platform as the plaintiff was alighting and saw the plaintiff in the act. The conductor so testifies, while the plaintiff testifies that the conductor was at the door of the rear platform, and no witness testifies to the

contrary. Nor is there any dispute as to the fact that the conductor rang the bell to start the car. A conductor who starts his car at a time when he knows a passenger is in the act of alighting is guilty of negligence as matter of law. The facts found by the jury, taken in connection with the admitted facts, establish beyond controversy that such was the case here, and hence there was no necessity for a formal finding of negligence by the jury. These considerations obviate the necessity of any consideration of the provisions of ch. 346, Laws of 1907 (sec. 2858*m*, Stats.)

A number of contentions relating to the charge of the court are made and will be briefly noticed:

First. The conductor of the car was examined before the trial under sec. 4096, Stats. (1898), and was cross-examined on the trial with relation thereto, and forced to admit that he made some statements upon his examination contradictory to those made on the trial. The court charged the jury in connection with question No. 2 as follows:

"But in considering your answer to that question you should not consider the evidence of the conductor given at any time prior to the trial of this action, *in so far* only as to determine the credibility of the conductor's evidence given here, and the weight to be given to his evidence."

It is now claimed that by this instruction the jury were told that they could not consider the statements made on the examination under sec. 4096, for the purpose of testing the conductor's credibility, and as this was the only purpose for which the statements were admissible it is said there was prejudicial error committed. It is very evident that the court intended just the opposite meaning, and this intention is so apparent that we regard the objection as hypercritical. It is true that the wording of this instruction is inaccurate, and that the word "except" should properly be inserted in place of "in so far;" but we are quite well convinced that the jury must have understood the sentence as the court intended and could not have been misled by its faulty wording. An in-

struction embodying the correct idea was refused by the court, but as we regard its substance to have been given in the instruction attacked there was no error in the refusal.

Second. An instruction to the effect that a slight want of ordinary care by plaintiff, contributing to his injury, would require an affirmative answer to the question of the verdict which was addressed to that subject, was requested and refused. The legal principle stated in the instruction was, of course, correct, but under the circumstances we do not consider the ruling erroneous. The only contributory negligence claimed was that the plaintiff attempted to alight while the car was in motion, and the court fully and carefully charged the jury that if he made this attempt, and by reason thereof fell or was thrown from the car, he was guilty of contributory negligence. This covered the whole subject and rendered any further instruction unnecessary.

Third. Two instructions bearing upon the third question were requested and refused. The first was to the effect that if the car was stopped and so remained for a length of time reasonably sufficient for the plaintiff in the exercise of ordinary care to alight, and the car was then started by defendant's servants without their knowing or having reason to believe that the plaintiff desired to alight or was in the act of alighting, then the starting of the car was not the proximate cause of plaintiff's injury. The second instruction was to the effect that if, when the car started, the plaintiff was not in a position reasonably calculated to inform defendant's servants, had they exercised due care, that plaintiff would probably be injured by the starting of the car, then the starting of the car was not the proximate cause of the injury. Inasmuch as the undisputed evidence shows that the conductor was on the rear platform and saw, or should have seen, the plaintiff as he was alighting, these instructions were not applicable to the evidence and hence were properly refused.

Fourth. An instruction to the effect that the burden of proof to show the amount of his damages was upon the plaint-

iff was refused. It would have been better to have given the instruction as asked, but inasmuch as the court charged fully and explicitly to the effect that the jury should only allow such damages as were proven by the evidence to a reasonable certainty to have been sustained by the plaintiff as the natural and probable consequence of the injury, we cannot regard the omission of the instruction as in any way prejudicial.

Fifth. An instruction that the jury were not bound to find the existence of any fact inherently improbable, although there was testimony from the mouths of witnesses tending to prove the fact, was properly refused. We find no evidence in the case to which it was fairly applicable.

By the Court.—Judgment affirmed.

SUFFERLING, Respondent, vs. HEYL & PATTERSON, Appellant.

April 21—May 11, 1909.

Master and servant: Fellow-servants: Subcontractor's servants: Negligence: Appeal and error: Remarks of court: Harmless error: Instructions to jury: Trial: Special verdict: Special interrogatories: Ordinary care: Damages: Burden of proof.

1. The servant of a general contractor and those of his independent subcontractor, all being engaged in executing a particular enterprise, are not fellow-servants.
2. There is no relation of master and servant between a general contractor and the servant of his independent subcontractor.
3. In an action against a principal contractor, where the servant of a subcontractor was injured by the falling of a hoisting apparatus which replaced a safe and suitable apparatus originally used, remarks of the court, in the presence of the jury, that no actionable negligence could be found unless the unsuitable apparatus was erected with the knowledge of the principal contractor or the change was seasonably brought to his attention before the injury, and also remarks in submitting the case to

the jury, that unless there was negligence on the part of the principal contractor's agent in charge of the work respecting the unsuitable apparatus the question relating to defendant's wrongful conduct should be answered in the negative, if erroneous, are so significantly in defendant's favor as to be harmless on his appeal.

4. In an action for injuries to a servant caused by an unsuitable hoist, where knowledge, actual or constructive, of the defendant of the unsuitable character of the hoist was charged in the complaint and denied in the answer, if that issue was a vital matter it should be submitted as a special question of the special verdict, if requested.

5. While it is better that the law governing special verdicts be administered according to its spirit and letter and to a somewhat technical degree where specific questions are requested covering well defined vital facts in issue, it is permissible for trial courts to exercise a considerable measure of discretion in that regard, which is not subject to review unless the statutory right is prejudicially invaded.

6. In a personal injury case an instruction to the jury: "By ordinary care is meant such care as a man of ordinary care and prudence would have used under circumstances like those disclosed in the testimony in this case," while it may be harmlessly inaccurate under the circumstances of the particular case, had better be phrased: "Ordinary care in the abstract is such care as the great mass of mankind ordinarily exercise, and as applied to any particular case it is such care as the great mass of mankind ordinarily exercise under the same or similar circumstances."

7. In a personal injury case an instruction to the jury: "In assessing damages in this case *you may allow plaintiff*, by way of compensation, such sum as will reasonably compensate him for such pain and suffering and for such loss of time as the evidence satisfies you *with a degree of reasonable certainty*, is the natural and probable consequence of the injury which he sustained," while faulty in that it is in form as if the jury were expected to award compensation to the plaintiff instead of merely to find, as a fact, what sum in money was equivalent to his loss, and also in that it contemplates the existence of two or more degrees of reasonable certainty, with the jury left to imagine the nature of the different degrees, is not necessarily prejudicial.

8. Material facts in issue in a civil case, in order to be found in favor of the party upon whom the burden of proof rests, must be established to the satisfaction of the jury by a preponderance of the evidence to a reasonable certainty.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

Action to recover for a personal injury.

In brief, plaintiff's claim was this: Defendant's servants negligently used a light hoisting apparatus, suitable only for lifting light articles, to elevate a heavy timber to the top of a building which such servants, together with plaintiff as an employee of a subcontractor of defendant, were engaged in erecting. The apparatus consisted of a scantling, extending out a few feet from the edge of the roof, to which a pulley and block, threaded with a hoisting rope with proper connections, was attached. The scantling was too weak and too insecurely braced to be suitable to sustain such a heavy weight as the one in question. Just as the timber was about to clear the ground plaintiff, in the due course of his work, stepped out of the building nearly under the overhanging scantling without realizing the condition aforesaid or being guilty of any want of ordinary care in that regard, when the scantling broke and fell, a piece thereof striking plaintiff and severely injuring him. The defendant knew, or ought to have known in the exercise of ordinary care, that the hoist as erected was entirely unsuitable for the use to which it was put and was liable, in so being used, to break, as it did, and injure persons who might, in the exercise of ordinary care, be, rightfully, in the pathway of falling pieces or parts of the apparatus, or articles in the process of being lifted thereby, and be injured. All facts upon which negligence was predicated were duly put in issue.

There was evidence to the effect that plaintiff was injured in the manner claimed; that he was, as alleged, at the time the hoist broke, in the regular performance of his duty as an employee of defendant's subcontractor; and that the hoist while being operated by defendant's servants broke, as claimed, with the consequences alleged. There was evidence tending to show that the hoist was not designed for any such

heavy work as that in course at the time of the accident; that, formerly, there had been one in place suitable for such work, but that it had been replaced by the subcontractors, a few days before the accident, by the lighter one because of the other being in the way, and that such lighter one was used at such time as the heavier one had been, though it was entirely unsuitable for the heavy work; that plaintiff did not know of the condition so created at the time the hoist broke; that he walked out of the building under, or nearly under, the projecting joist just as two men on the floor above pulled on the rope so as to raise the timber from the ground, when the supporting scantling broke and the piece came down upon him, as alleged, fracturing his skull and otherwise injuring him.

Counsel for defendant unsuccessfully moved the court to submit, as parts of a special verdict, several questions covering the subject of whether the insecure hoist was erected in place of the secure one, to the knowledge of defendant's representative in general charge of the work, and whether such representative had knowledge, actual or constructive, of the insufficiency.

The jury found substantially as follows: Defendant, in prosecuting the heavy work with the hoist, failed to use ordinary care. Such failure was the proximate cause of the injury. Defendant, in the exercise of ordinary care, ought reasonably to have foreseen that some one might probably be injured as a result of the hoist being used as it was at the time of the accident. Plaintiff did not assume the risk of being injured by the insecure hoist. He was not guilty of contributory negligence. He was damaged to the extent of $2,000.

For the appellant there was a brief by *Doe & Ballhorn,* and oral argument by *J. B. Doe.*

For the respondent there was a brief by *Rubin & Zabel,* and oral argument by *W. C. Zabel.*

MARSHALL, J. Complaints made respecting rulings on evidence have received the attention which, in the judgment of the court, they merit without our discovering any sufficient ground for disturbing the judgment. A reference to such rulings is omitted because no one of them seems to call for a decision respecting it of sufficient importance as a precedent to require discussion with references and a statement of reasons on principle or authority, or both, why the ruling was either not erroneous, or, if otherwise, not harmful.

The point is made that the claim of respondent in the complaint was that there was negligence in putting up and leaving in place for use the unsuitable hoist, while, on the trial, recovery was sought solely on the ground of negligence in using an unsuitable hoist by appellant's servants with its knowledge, actual or constructive, thereof; that there was a fatal variance between the complaint and the evidence. Without conceding that, under the circumstances, there was such a variance, if the situation be as counsel suggest, it is the opinion of the court that the contention is based on a misconception of the complaint. It expressly, or by reasonable inference, states the ground of negligence counsel suggest was relied upon at the trial.

The claim is made that there was no evidence that appellant knew of the unsuitable hoist having been substituted for the suitable one and, therefore, if there was any negligence on the occasion in question, it was merely negligence of defendant's employees, and, notwithstanding they were servants of the general contractor and plaintiff was a servant of an independent subcontractor, all were fellow-servants, and, therefore, the motion for a nonsuit should have been granted. That presents the question of whether servants of a general contractor and those of his independent subcontractor, all being engaged in executing a particular enterprise, as the construction of or repair of a building, are fellow-servants within the meaning of that term as used in the law of negligence.

The counsel's deduction from the fellow-servant law seems to be illogical. It is elementary that the results of negligence of an independent subcontractor or that of his servants imputable to him cannot be charged to his principal. It must follow that servants of the latter are not fellow-servants with the employees of the subcontractor.

The reason why a general contractor is not liable for the negligence of the servants of his independent subcontractor is because there is no master and servant relation existing between such general contractor and such servants (*Whitney & S. Co. v. O'Rourke,* 172 Ill. 177, 50 N. E. 242), hence no duty and none of the responsibilities incident to such relation.

As counsel fail to support the claim above suggested other than by assertion and the law seems quite elementary, as we have indicated, time will not be taken to further pursue the subject or to point to judicial holdings in respect thereto.

Several errors are assigned upon the theory that defendant was not chargeable with negligence of its servants in the use of the insufficient hoist unless it had actual or constructive notice of the substitution thereof for the suitable hoist and notice, actual or constructive, of the insufficiency of the substituted appliance. The court remarked in the presence of the jury during the argument that there could be no actionable negligence found unless the unsuitable hoist was erected with knowledge of appellant, or the change was seasonably brought home to it before the accident. Also in submitting the case to the jury care was taken to explain that unless there was negligence on the part of appellant's agent in charge of the work respecting the unsuitable hoist, the question on the subject of appellant's wrongful conduct should be answered in the negative. Whether that was strictly correct or not we will not take time to consider. If it were not, the error was significantly in appellant's favor. There was evidence to go to the jury on the subject, as we read the record. So the question strenuously claimed to be vital to the right to

recover was passed upon in respondent's favor upon some credible evidence.

True, knowledge, actual or constructive, of appellant of the existence of the unsuitable hoist was charged in the complaint and denied in the answer. Therefore, if that were a vital matter, as the trial court and all parties concerned seem to have supposed it was, it should have been submitted to the jury by a specific question so framed as to direct attention to the precise matter, as requested by appellant's counsel. Such is the command of the statute (sec. 2858, Stats. 1898), and such is the only proper administration of it, as has over and over again been decided. *Lee v. C., St. P., M. & O. R. Co.* 101 Wis. 352, 77 N. W. 714; *Bigelow v. Danielson,* 102 Wis. 470, 473, 78 N. W. 599; *Schrunk v. St. Joseph,* 120 Wis. 223, 97 N. W. 946; *Olwell v. Skobis,* 126 Wis. 308, 319, 105 N. W. 777.

It were better that the special verdict law be administered according to its spirit and letter and to a somewhat technical degree where specific questions are requested covering well defined vital facts in issue. However, it is permissible for trial courts to exercise a considerable measure of discretion. Unless they exceed that field so as to prejudicially invade the statutory right to a special finding on the material issues of fact, as was the case in *Rowley v. C., M. & St. P. R. Co.* 135 Wis. 208, 115 N. W. 865, the importance of stability of initial determinations, except in case of a probable substantial wrong result being within reasonable probabilities, and of speedy economical termination of judicial controversies, require the beneficent statute, so often referred to (sec. 2829, Stats. 1898), to be efficiently applied.

Error is assigned because the trial court said to the jury:

"By ordinary care is meant such care as a man of ordinary care and prudence would have used under circumstances like those disclosed in the testimony in this case."

That is a peculiar phrasing of the rule the learned trial judge purposed stating. It seems to be the one used generally

in the particular jurisdiction in question. It has been several times challenged as being wrong and been criticised. *Hanlon v. Milwaukee E. R. & L. Co.* 118 Wis. 210, 95 N. W. 100; *Palmer v. Schultz,* 138 Wis. 455, 120 N. W. 348. In the first case the question presented was whether the term "such care as a man of ordinary care" is substantially the same as "such care as the great mass of mankind," and the court said it covered the vital idea, but that the latter phrasing was preferable. In *Palmer v. Schultz, supra,* the same instruction was criticised, but passed as harmlessly inaccurate under the circumstances. It seems that it is also harmlessly imperfect in this case, but, inasmuch as this particular phrasing of ordinary care has been now three times suggested as not the best way to state the principle, and to the end that so simple a matter may be given to the jury in such a manner as to avoid such frequency of attack and criticism, it is again suggested that the phrasing of the rule so often approved here be used: ordinary care in the abstract is such care as the great mass of mankind ordinarily exercise, and as applied to any particular case it is such care as the great mass of mankind ordinarily exercise under the same or similar circumstances.

The court instructed the jury that:

"In assessing damages in this case, gentlemen, *you may allow plaintiff,* by way of compensation, such sum as will reasonably compensate him for such pain and suffering and for such loss of time as the evidence satisfies you *with a degree of reasonable certainty,* is the natural and probable consequence of the injury which he sustained."

The instruction is faulty in that it is in form as if the jury were expected to award compensation to the plaintiff instead of merely to find, as a fact, what sum in money would be an equivalent for his loss. Again it is faulty in that it contemplates the existence of two or more degrees of reasonable certainty susceptible of being established by evidence in such a case, and the jury were left to understand, possibly, that a

fact affirmed by plaintiff to exist and denied by the defendant, in order to be found was required to be established to some one of the several degrees, while they were left, possibly, to imagine the nature of the different degrees. The claim that the language was confusing is not entirely without merit, though we hardly think the jury could have been prejudicially misled. They should have been told, substantially, that in answering the question they should name such sum as they found from the preponderance of the evidence to a reasonable certainty would be required to fairly compensate plaintiff in money for such loss of time and such pain and suffering as they were so satisfied was chargeable to the injury. However, as suggested, it does not seem that the novel method of putting the matter could have reasonably worked any harm.

The rule is that the material facts in issue in a civil case, in order to be found in favor of the party upon whom the burden of proof rests, must be established to the satisfaction of the jury by a preponderance of the evidence to a reasonable certainty;—must be established by a preponderance of the evidence, is the common way of stating the matter, but that means to a reasonable certainty. The use of the latter words has been approved (*Pelitier v. C., St. P., M. & O. R. Co.* 88 Wis. 521, 60 N. W. 250; *Grotjan v. Rice,* 124 Wis. 253, 102 N. W. 551), and failure to use them, when requested specially, unless the jury are adequately instructed otherwise, has been condemned (*Ward v. C., M. & St. P. R. Co.* 102 Wis. 215, 219, 78 N. W. 442). So, true, as the trial court said, the jury were required to be satisfied from the evidence to a degree of reasonable certainty. They could hardly be satisfied to any such degree of certainty unless so satisfied from the evidence that the major probabilities were accordingly; in other words, without being satisfied from the preponderance of the evidence. They could hardly be satisfied from the evidence to a degree of reasonable certainty without

being so satisfied from the preponderance of the evidence to a reasonable certainty. It were better, however, that new and somewhat obscure and inaccurate methods of phrasing a simple proposition of law should not be indulged in.

By the Court.—The judgment is affirmed.

STATE, Plaintiff, vs. HEIDEN, Defendant.

April 24—May 11, 1909.

Criminal law and practice: Indictment and information: Duplicity: Certified questions: Compliance with statute: Embezzlement: Sufficiency of verdict: Instructions to jury: Ignoring evidence.

1. It is only when it appears by the indictment itself that two or more distinct acts are involved in the commission of two or more crimes charged that an indictment or a count therein charging two or more offenses is bad for duplicity.
2. An indictment for embezzlement alleging in one count that defendant embezzled a note and the proceeds of two other notes is not bad for duplicity, since all might have been appropriated by a single act.
3. In order to answer a question of law in compliance with the calls of sec. 4721, Stats. (1898), it is necessary that the facts upon which that question rests should be resolved by the trial court and certified; not the evidence, but the ultimate facts, and all of them that are material to determination of the question.
4. Failure to so certify the facts precludes the supreme court from giving answer to the question.
5. For the purpose of invoking answers to questions certified under sec. 4721, Stats. (1898), each question should be a distinct proposition of law and a question of law only, not a question of fact, or of mixed law and fact.
5. Where the proof was identically the same and of equal credibility with reference to the charges contained in two counts of an indictment each charging embezzlement, a verdict of guilty on the first count, without any finding as to the second count, does not upon its face appear repugnant, inconsistent, perverse, or the result of compromise, at least in the absence of the instructions under which the jury were proceeding.
6. A question certified under sec. 4721, Stats. (1898), inquiring

whether the court committed error in refusing three enumerated instructions requested by the defendant, cannot be answered categorically where the answers must differ with the requests, and is in disobedience of the singularity and concreteness of interrogation required.

7. In a prosecution for embezzlement a requested instruction that, in the absence of a definite time fixed by law or regulation in which public funds should be turned over, the defendant had a reasonable time after the termination of his employment or after demand to account and pay over the funds before he could be found guilty, is properly refused where the uncontradicted evidence authorized the jury to find that at various stages the defendant might have formed the intent to appropriate the money.

8. For like reasons a requested instruction that the defendant would not be guilty until a demand or reasonable time after his employment had ceased had expired, unless at the time he received the money he formed the intention to take it, is properly refused.

9. Where the crime of embezzlement is committed no demand is necessary, and no response to such demand by actual payment absolves the offender from the already complete guilt.

REPORTED from the circuit court for Milwaukee county: OREN T. WILLIAMS, Circuit Judge. *First, third, and fifth questions answered in the negative; answers to the other questions refused.*

The defendant having been inspector of the house of correction in Milwaukee county for more than six years prior to December 30, 1903, on that day indictment was found against him containing two counts, the first of which was that on December 31, 1897, he, being charged with the duty of controlling and managing the business affairs of the house of correction subject to laws, rules, and regulations adopted by the board of supervisors, which business included the manufacture of chairs, did on that day, in discharge of his duties, receive and take into possession one certain promissory note of the Hardy Manufacturing Company, dated December 3, 1897, and also a certain fund of $299, proceeds of the pay-

ment of two promissory notes of A. J. Warren, dated October 21, 1897, the property of the county, and that he on said day unlawfully and feloniously embezzled said note and said fund. The second count alleged the same state of facts, except that the defendant on said December 31, 1897, had the custody of the two Warren notes and a fund of $307.30, proceeds of the Hardy Furniture Company note, and did embezzle said notes and said fund. The verdict was guilty under the first count and was silent as to the second count. The court reported that certain questions of law were doubtful and requested their answer by this court under sec. 4721, Stats. (1898). He certifies that there was certain undisputed evidence to the effect that under the regulations of the county board a bookkeeper had been appointed to keep all books and accounts under defendant's supervision; that the custom of business was that when notes were received for goods sold they were retained in the custody of the bookkeeper until near their maturity, when they were handed over to the defendant and by him placed with a certain bank for collection and the proceeds credited to an account kept by such bank in the name of *Fred Heiden, Jr.*, and entered, with proper designation, in an ordinary bank passbook which was retained by defendant; that periodically he handed this passbook to the bookkeeper, whose duty it was therefrom to make credits to the bills receivable account on his books for the amount so collected, charging them presumably to the defendant; that the three notes mentioned in the indictment were received during defendant's incumbency of the office; that they were not credited upon the books of the county by the bookkeeper; that in 1902 a new bookkeeper discovered discrepancy between the total balance of the bills receivable account and the actual notes then on hand and called defendant's attention thereto. He, apparently surprised, asserted that the discrepancy must have arisen before his day without

checking up to ascertain what notes had failed of credit. Thereafter the bookkeeper made an entry in the journal:

"Chair acct. dr. $———.

"To bills receivable, cr. $———.

"Amount charged Bills Receivable for which there were no notes on hand when books were turned over to Inspector *Heiden;* this discrepancy appears to run back for many years."

Defendant resigned his position September 28, 1903, and on December 30, 1903, before the indictment was found, he paid the amount of the three notes to the county treasurer. The questions will be stated in the opinion.

For the plaintiff there was a brief by the *Attorney General,* and oral argument by *F. C. Eschweiler* and *J. E. Messerschmidt.*

For the defendant there was a brief by *W. H. Austin* and *G. G. Gehrz,* and oral argument by *Mr. Gehrz.*

DODGE, J. 1. The first question, "Is the indictment or either of the counts thereof double, and did the court err in denying defendant's objection to the admission of any evidence thereunder?" must be answered in the negative, because it is entirely conceivable that the act of embezzlement of the Hardy Furniture Company note and of the money proceeds of the two Warren notes might be accomplished by a single act so far as anything appears on the face of the indictment. For illustration, that note and that fund of money might have been in a single envelope and been taken by the defendant with the intent and purpose then present to appropriate the whole to his own use. It is only when it appears by the indictment itself that two or more distinct acts are involved in the commission of two or more crimes charged that an indictment or a count therein charging two or more offenses is bad for duplicity. *Cornell v. State,* 104 Wis. 527, 532, 80 N. W. 745; *Vogel v. State,* 138 Wis. 315, 119 N. W. 198.

2. The second question is: "Did the court err in denying defendant's motion, made before the introduction of any evidence under the indictment, repeated at the conclusion of the state's case, and again made and urged when all the evidence was in, to require the state to elect whether it would proceed against the defendant upon the charge of embezzlement of the notes referred to therein or of the proceeds of said notes?" The motions referred to in this question, or some of them, presented to the trial court for consideration whether the acts claimed to constitute the separate crimes alleged in each count as appeared by the evidence were distinct and separate, so that the evidence which might establish or refute one was different from that with reference to another as explained in the *Cornell Case, supra.* But the trial court has wholly failed to inform us whether the evidence so disclosed or not. In order to answer a question of law in compliance with sec. 4721, Stats. (1898), it is necessary that the facts on which that question rests should be resolved by the trial court and certified to us; not the evidence, but the ultimate facts, and all of them which are material to determination of the question. *State v. Anson,* 20 Wis. 651; *Sigafus v. Porter,* 85 Fed. 689, 29 C. C. A. 391; *McHenry v. Alford,* 168 U. S. 651, 18 Sup. Ct. 242. That has not been done, and we therefore cannot answer this question. Further, the question is not single, but threefold, which constitutes another obstacle to its certification and consideration. Id. In *U. S. v. U. P. R. Co.* 168 U. S. 505, 512, 18 Sup. Ct. 167, certain requisites of a certification under the federal judiciary act of March 3, 1891 (26 U. S. Stats. at Large, 826, ch. 517, U. S. Comp. Stats. 1901, p. 488), are catalogued which are quite as essential to a compliance with sec. 4721:

"Each question had to be a distinct point or proposition of law, clearly stated, so that it could be distinctly answered without regard to the other issues of law in the case; to be a question of law only, and not a question of fact, or of mixed law and fact, and hence could not involve or imply a conclu-

sion or judgment upon the weight or effect of testimony or facts adduced in the case; and could not embrace the whole case, even where its decision turned upon matter of law only."

3. The third question is whether the verdict should be set aside because repugnant, perverse, inconsistent, or the result of compromise; the proof being, as the certificate declares, identically the same and of equal credibility with reference to the charges contained in the two counts of the indictment. While this question borders closely on presenting mixed law and fact for decision, we think we may venture the opinion that upon the face of the verdict itself repugnancy, inconsistency, or perversity does not affirmatively appear. The verdict, even as to the first count, is of course vague and uncertain by reason of the refusal of the court to require election. It is uncertain whether the jury deemed the taking of the notes the embezzlement, or some of the subsequent acts, such as the receipt of the money or the subsequent application thereof to defendant's own use. They may have found that the taking of the Hardy Furniture Company note and depositing the same with the bank was done with fraudulent intent and based their verdict of guilty as to the first count on that fact without considering or deciding on embezzlement of the money proceeds of the Warren notes, in which event even express finding of not guilty of the crime of embezzling the fund resulting from the collection of the former note or of the taking of the two Warren notes would not be inconsistent. However, we do not view the mere failure to make a finding with reference to the charges contained in the second count tantamount in fact to a declaration of the jury's decision that the defendant was not guilty, although the acceptance of such imperfect verdict may by law result in an acquittal of the second count. The jury have not spoken on that subject expressly, and their silence is not necessarily repugnant to or inconsistent with the declaration of their conclusion as to the charges contained in the first count or some one of them; at least such repugnancy and inconsistency does

not appear in absence of the instructions under which the jury were proceeding.

4. The fourth question is whether the court erred in admitting in evidence the original entry quoted in the statement of facts against the defendant's objection. We are prevented from answering this question for the same reasons expressed with reference to the second. The degree of defendant's connection or opportunity for connection with or knowledge of that entry must of course control the decision of the trial court as to its relevancy to establish a fraudulent purpose in the defendant to divert to his own use the property mentioned in the indictment. The record sent here is barren of any showing whether defendant ever knew of such entry; if so, whether he ever repudiated it; and whether, under the rules controlling the bookkeeping, he had any such contact with the books of original entry as to make his knowledge of individual entries therein probable or control over them possible. These are all questions of fact to be resolved by the trial court before ruling upon the admissibility of the book entry, and cannot be certified under this statute. *State v. Gross,* 62 Wis. 41, 21 N. W. 802; *State v. Juneau,* 88 Wis. 180, 59 N. W. 580.

5. The fifth question is in disobedience of the requirement of singularity and concreteness. It inquires whether the court committed error in refusing three instructions requested by defendant, numbered 7, 8, and 9. It cannot be answered categorically because the answers must differ with the requests. *State v. Anson,* 20 Wis. 651; *State v. Jenkins,* 60 Wis. 599, 19 N. W. 406. However, the seventh and ninth requests we think were properly refused because the instructions therein were themselves incorrect as statements of law. The seventh is as follows:

"Unless it clearly appears by the evidence that a definite time was fixed by law or by some rule or regulation of the board of supervisors in which moneys collected or received by the defendant as inspector of the house of correction should

be turned over and delivered to Milwaukee county, then I instruct you that the defendant had a reasonable time after his resignation or the termination of his office or after demand made upon him therefor in which to account for and pay over such moneys before he can be found guilty of the crime charged in this indictment."

It is obvious, in view of the statement of uncontradicted evidence contained in the report, that there are several stages at which the embezzlement might be deemed to have been committed. Thus, when defendant received from the bookkeeper a note, if he had then formed and was then actuated by a fraudulent intent to convert the same to his own use, he doubtless then completely committed embezzlement, and likewise, if he had no such motive, he did not. Again, when he handed the note to the bank with directions, express or implied, to collect and credit the money in his private account, guilt or innocence was dependent on the motive with which he did it, and, if the criminal motive existed, the crime might have been then committed; or, indeed, the jury might have concluded that when the money was actually received by the bank and at defendant's direction placed in his private account, if they also believed the purpose to convert then existed, the crime of embezzlement might at that time have been committed. Still again, if they believed each of the preceding steps had been innocent of any such motive, but, together, had resulted in the county's money being in defendant's possession, the jury might have found that the entry on the books, which in some measure concealed the fact of such possession, was caused by the defendant with a purpose to defraud the county; and finally, if all of these acts were innocent, they might have found that the failure to pay over on retirement from office or on demand was the time of committing the crime, or constituted evidence of a bad motive entertained by defendant at the time he took some of the preceding steps. Thus it obviously is not true that he could

not be found guilty without such demand and the lapse of a reasonable time thereafter to make his accounting. The instruction ignored the possibility of the jury's finding that he completed his embezzlement at some of the prior transactions if there were evidence from which the inference of fraudulent intent might be drawn. If then committed, no demand was necessary, and no response to such demand by actual payment could absolve him from the already complete guilt. *Guenther v. State,* 137 Wis. 183, 118 N. W. 640. The instruction embodied in the ninth request presents the same vice in part as that above discussed. That instruction was to acquit if the jury found that the payment was made by defendant within a reasonable time, unless at the time he received the money he intended fraudulently and unlawfully to keep the same. This ignores the possibility that the jury might find either such fraudulent intent at the time he received or deposited with the bank such notes, or that he was in complicity with the bookkeeper in falsifying the county's books with fraudulent intent.

The eighth request was for the following instruction:

"I charge you that a public officer cannot be legally convicted of an offense such as is charged in this indictment by showing a mere neglect to pay over to the proper county officers funds which may have come into his hands as such officer, unless such failure to pay over continues for an unreasonable length of time after the termination of his office, or unless such officer refuses after demand made to account for and pay the same, or unless a definite time is fixed by law or rule in which the same must be paid over."

This instruction might, under some conditions of evidence, have been proper. But we cannot know what condition of evidence existed. It may be true that the *mere* neglect to pay over a balance by a retiring county officer may be insufficient to justify conviction unless surrounded by circumstances justifying an inference of wrong motive or purpose.

But we do not know that any situation was presented by the evidence to make such a rule of law applicable. Further, the evidence might have been such as to entirely exclude any inference that less than a reasonable time had elapsed before the payment of the money. Even if defendant were ignorant of the fact that these moneys passing into his hands had not been properly credited to the county prior to his retirement from office, we have nothing to inform us when he learned that fact, nor what rules and regulations existed as to his duty to pay or the person to whom he should make payment. Hence it is impossible to answer that the refusal of said eighth request was error or to know that it was not. *State v. Cornhauser,* 74 Wis. 42, 45, 41 N. W. 959; *State v. Knight,* 118 Wis. 473, 95 N. W. 390.

The sixth question is whether the court should grant defendant's motion for a new trial by reason of the presence of one Fred C. Meyer upon the jury who is claimed not to have been the Fred C. Meyer placed upon the jury list by the commissioners. That question is submitted upon all the former description of what transpired on the trial, also upon the indictment, the list of jurors, the verdict of the jury, and the sworn testimony, by affidavit or otherwise, of some ten witnesses. This is not a question of law, but involves the decision of questions of fact and of mixed fact and law, as well as the question of prejudice to the defendant, and is not proper for certification under sec. 4721. *State v. Anson,* 20 Wis. 651; *State v. Gross,* 62 Wis. 41, 21 N. W. 802; *State v. Cornhauser, supra; State v. Juneau,* 88 Wis. 180, 59 N. W. 580; *State v. Knight, supra; Cross v. Evans,* 167 U. S. 60, 17 Sup. Ct. 733; *McHenry v. Alford,* 168 U. S. 651, 18 Sup. Ct. 242.

By the Court.—The first and third questions are answered in the negative, also the fifth question so far as it relates to the seventh and ninth requests for instructions. Answers to the other questions are refused.

HOWARD, Plaintiff in error, vs. THE STATE, Defendant in error.

April 24—May 11, 1909.

Burglary: Statutory offense: Statutes: Construction: "Any other building:" Criminal law and practice: Trial: Former conviction: Error in admission of evidence: Reversal: Mandate.

1. Under sec. 4409, Stats. (1898), making it an offense to break and enter in the nighttime any office, shop, warehouse, or any other building with intent to commit enumerated felonies, the words "any other building" are not intended to include a schoolhouse or other building erected or employed for public purposes.
2. Where former convictions and sentences, as permitted by secs. 4736–4738, Stats. (1898), are alleged in the information and the accused admits their truth on the trial, it is prejudicial error to admit evidence thereof and permit comment thereon to the jury.
3. Where an accused was found guilty and sentenced upon an information that charged no offense in the law, the sentence and judgment will be reversed.

ERROR to review a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Reversed.*

This action is before this court on a writ of error to review the judgment of the circuit court which sentenced the plaintiff in error to imprisonment at the state prison for the term of six years, he having been found guilty of "wilfully, feloniously, and burglariously" breaking and entering "in the nighttime of a certain day a certain building and schoolhouse, not adjoining with nor occupied as a dwelling house, . . . the joint property of joint school district No. 10 of the towns of Hamilton and Farmington, . . . with intent the goods and chattels of one Earl McIntosh then and there being found, feloniously to take, steal, and carry away." The jury also found that the plaintiff in error, previous to the commission of the burglary, had been convicted and sentenced for three crimes, twice for burglary and once for grand lar-

ceny, and that such sentences remained of record unreversed. After the jury had been sworn they retired under the court's direction, and the defendant admitted in open court the former convictions and sentences as charged in the information and that the same were unreversed, and objected to the introduction of evidence on these charges. The objection was overruled and the state was permitted to introduce in detail evidence of the prior offenses and also evidence of defendant's prison record under such sentences.

For the plaintiff in error there was a brief by *Morris & Hartwell,* and oral argument by *T. H. Morris.*

For the defendant in error there was a brief by the *Attorney General, J. E. Messerschmidt,* assistant attorney general, and *Otto Bosshard,* district attorney, and oral argument by *Mr. Bosshard.*

SIEBECKER, J. The information charges that the plaintiff in error burglariously broke and entered a schoolhouse in the nighttime with intent to steal the property then therein. It is urged that the alleged charge does not constitute an offense within the criminal law of this state. It is manifest that the information attempts to charge an offense under sec. 4409, Stats. (1898). Originally this statute was embodied in R. S. 1849, ch. 134, sec. 11, which made it an offense to "break and enter in the nighttime any office, shop or warehouse not adjoining to or occupied with a dwelling house, . . . with intent to commit the crime of murder, rape, robbery, larceny or any other felony." This continued to be the law until 1878, when it was amended by inserting the words "or any other building" after the word "warehouse." Do the words so added by amendment include all buildings or are they restricted in their scope? It is evident that secs. 4407–4411, Stats. (1898), inclusive, are an enumeration of the instances which constitute the statutory crime of burglary. They nowhere specifically indicate that it was intended that

the breaking and entering of a schoolhouse or any other building devoted to public uses with intent to commit any of the offenses specified in sec. 4409, Stats. (1898), should be a burglary. The statute must be interpreted in view of the nature of the offense.

Burglary at common law was an offense against the habitation and not against property, and was confined to dwellings. In recent times the offense has been extended to include breaking and entering of shops, warehouses, and other premises, thereby making it an offense against property also. The offense as extended now includes structures and premises, a breaking and entry into which constitutes an offense not only against habitation, but also against the ownership of private property. The history of sec. 4409, Stats. (1898), supports the idea that the offense created thereby was to include the elements of an offense against property as well as against habitation. The offense was not generally predicated of structures and premises devoted to public uses, nor are the features of the offense such that from its nature it necessarily includes a breaking and an entering of such structures and premises. The legislation on the subject indicates that in this state the crime of burglary as defined thereby was not intended to embrace a breaking and an entry into buildings devoted to public uses. Nowhere are such buildings specifically designated within these statutes, while sec. 4412 of the criminal law specifically provides a penalty for breaking, entering, and stealing in public buildings. This indicates that an offense involving the breaking into and an entering of buildings devoted to public uses is specifically embraced in and is to be punished under the later section, and thus tends to show that it was not included in the former as a burglary. To include it in both would lead to repugnancy between the two sections, in that two punishments would be inflicted for the same act. We are of opinion that the words "or any other building" contained in sec. 4409, Stats. (1898), were

not intended to include a schoolhouse or other building erected or employed for public uses. From this it follows that the facts stated in the information do not charge the crime of burglary as defined by sec. 4409, Stats. (1898).

It is insisted that the objection to the introduction of evidence to prove the three prior convictions and sentences of the plaintiff in error, as alleged in the information under sec. 4736, Stats. (1898), should have been sustained. As above stated, before the state proceeded to introduce its evidence after the jury were impaneled and sworn, the defendant requested that the jury be directed to retire to permit him to admit of record the truth of the charges in the information concerning the alleged former sentences and that they remained of record unreversed. This request was granted, and plaintiff in error then admitted the truth of these allegations in open court and demanded that no evidence concerning them should be received and that the district attorney should be prohibited from commenting to the jury on such admissions as a fact tending to show his guilt of the offense charged when taken in connection with the other testimony in the case. The purpose of the statute pertaining to the punishment of criminals found guilty of successive offenses was considered in *Ingalls v. State,* 48 Wis. 647, 4 N. W. 785. It is there stated:

"The increased severity of the punishment for the subsequent offense is not a punishment of the person for the first offense a second time, but a severer punishment for the second offense, because the commission of the second offense is evidence of the incorrigible and dangerous character of the accused, which calls for and demands a severer punishment than should be inflicted upon the person guilty of a first crime."

It is also to be noted that the provisions of this statute (sec. 4736, Stats. 1898) are incorporated as a part of the law of judgments in criminal cases and the execution thereof. This indicates that the legislature did not regard it as part of the

Criminal Code which defines offenses, but treated it as a part of the criminal law regulating the sentence and judgment in cases where persons are guilty of successive state prison offenses. This view of the legislation negatives the claim sustained by the decision of the court of appeals of New York in *People v. Sickles,* 156 N. Y. 541, 51 N. E. 288, to the effect that, under the Code of Criminal Procedure in that state, such former conviction is an essential ingredient of and enters into and is made part of the offense with which the accused is charged and for which he is being tried. It may also be observed that the act on this subject in the New York Code of Criminal Procedure contains no provision respecting an admission of such former sentences. That court therefore considered that this fact in the information must be established in all cases by the prosecution as any other allegation of the information. Not so under the statute of this state, for it provides that the accused may admit this allegation on the trial. This provision carries with it, necessarily, the implication that under legal procedure no proof on the subject is necessary or need be required. This provision also suggests that the legislature intended to give the accused an opportunity to avail himself of the right afforded by the law which, except in certain cases, excludes evidence of other offenses from being submitted to the jury as proof of the guilt of the accused of the specific offense for which he is on trial. It is beyond controversy that proof of former sentences of the accused must necessarily prejudice the minds of the jurors against his interest when trying him for the offense with which he is charged. It is therefore a reasonable inference from the legislative regulation giving the accused the privilege of admitting such former sentences on the trial that it was intended that evidence thereof should not be received after such admission, and that there was no issue respecting such allegations for submission to the jury. Though this practice and procedure is not formally inserted in the statute, it fol-

lows by necessary implication in order to secure to the accused the rights manifestly contemplated by it. These conclusions necessarily condemn the procedure adopted by the trial court in this case as erroneous and prejudicial. We are of opinion that no evidence should be received nor comment to the jury be permitted in cases wherein former convictions and sentences, as embraced in secs. 4736–4738, Stats. (1898), are alleged when the accused admits the truth thereof on the trial.

The plaintiff in error was found guilty and sentenced upon an information that charges no offense in the law. The sentence and judgment must therefore be reversed.

No other questions need be considered.

By the Court.—The judgment is reversed. The warden of the state prison is directed to deliver the plaintiff in error, *James Howard,* to the custody of the sheriff of La Crosse county until otherwise ordered or discharged therefrom according to law.

DE BLAZIO and another, Plaintiffs in error, vs. THE STATE, Defendant in error.

April 24—May 11, 1909.

Assault regardless of human life: Admissibility of evidence.

In a criminal prosecution for assault regardless of human life, where the evidence was sharply conflicting as to whether defendants, or one of them, did the shooting charged, or whether one G. did it, and there was evidence that G. and his brother left the scene immediately after the shooting, it is error to exclude testimony of a witness tending to show that, within half an hour after and in the immediate vicinity of the affray, G.'s brother handed the witness two revolvers, one loaded and one empty.

ERROR to review a judgment of the municipal court of Milwaukee county: A. C. BRAZEE, Judge. *Reversed.*

The cause was submitted for the plaintiffs in error on the brief of *Dorr & Gregory,* and for the defendant in error on that of the *Attorney General, A. C. Backus,* district attorney, and *Norman L. Baker,* assistant, of counsel.

KERWIN, J. The plaintiffs in error, hereinafter called defendants, were convicted of an assault regardless of human life and sentenced to confinement in the house of correction in the county of Milwaukee. They removed the record here by writ of error. The defendant *Biajio De Blazio,* at the time of the alleged assault, lived with his wife and two children in a two-story frame house on Jackson street in the city of Milwaukee. The defendant *Joseph De Blazio,* Michael Millelo, and Joseph Di Vallerio boarded with defendant *Biajio De Blazio.* Frank Gillotti and Tony Gillotti, brothers, had formerly roomed in the house of defendant *Biajio De Blazio,* and at the time of the alleged assault had returned to get some articles which they had left there. When Frank called to get his effects he was accompanied by his brother Tony and two others, Di Veto and Marceo. The four entered the defendant's house together. At the time of entry the two defendants, the two boarders, and the wife of defendant *Biajio De Blazio* were in the house. After some conversation Frank Gillotti went to one of the bedrooms, procured the effects, and returned to the kitchen. Then followed some dispute relative to a cot which Frank claimed, but which defendant *Biajio* refused to let him have.

The evidence on behalf of the state tends to show that *Biajio* stated that Frank Gillotti was indebted to him for board, and, a dispute having arisen, *Biajio* stepped back and drew a revolver from his hip pocket, whereupon he was seized by Tony Gillotti, who caught him and threw him down at the foot of the stairs, and during the scuffle the revolver was dis-

charged; that the defendant *Joseph De Blazio,* who was then on the stairs, drew a revolver and commenced shooting at Frank Gillotti, who was at the door leading outside from the kitchen, and that he also fired at Tony Gillotti; that the Gillotti brothers then ran away, neither of them having been injured.

On the part of the defense the testimony tends to show that after the dispute between *Biajio De Blazio* and Frank Gillotti, Tony jumped upon *Biajio De Blazio* and threw him to the floor at the foot of the stairs, and that defendant *Joseph* went upstairs at the time Frank went into the bedroom to get his goods, and was attracted by the shouts of *Biajio* and started to go downstairs, but was prevented by Frank Gillotti, who stood at or near the kitchen door, and that Frank drew a revolver and commenced shooting in a southeasterly direction towards the stairway, and that when the trouble was over *Biajio,* who had been held at the foot of the stairs by Tony, was found to have been shot through the left forearm. The Gillottis further testified that they were unarmed at the time of the assault and did no shooting.

There is a sharp conflict in the evidence as to who did the shooting, several witnesses testifying that Frank Gillotti did, and others that the defendants, or one of them, did. So the question of who did the shooting was a material issue in the case. From the evidence the jury would have been justified in finding that Frank Gillotti was armed and fired several shots, although both Frank and Tony denied being armed and denied doing any shooting at the time of the assault. There is also evidence tending to show that the assault took place at about 5 o'clock in the afternoon of the day in question, and that both Frank and Tony left the defendant's house immediately after the assault and only about half a minute apart. Michael Millelo, one of the witnesses for the defense, was asked the following question:

"You may state whether or not, on the afternoon of January 11, 1908, at the hour of 5:30 o'clock, in the immediate vicinity of *Biajio De Blazio's* house, Tony Gillotti handed you two revolvers, one loaded and one unloaded."

This question was objected to by counsel for the state and the objection sustained, and this ruling is assigned as error. The question whether Frank was armed and did any of the shooting was a material issue in the case, and whether either Frank or Tony had in his possession revolvers shortly after the assault, and in the immediate vicinity of the premises, was material on the main question, namely, whether Frank did in fact do any shooting, since they both denied being armed. While it does not appear from the evidence that Tony Gillotti did any shooting, he went with his brother to the defendant's house and was connected with the assault, and left about half a minute after his brother Frank. In face of their testimony that they were unarmed and the testimony of several witnesses that Frank was armed and did the shooting, and the fact that they both left the place of assault at about the same time, we think evidence that either of them delivered two revolvers, one unloaded and another loaded, to the witness, within half an hour after the assault, was material, and the exclusion of it prejudicial error.

Other errors assigned need not be considered, since the questions presented by them are not likely to arise upon another trial.

By the Court.—The judgment of the court below is reversed, and the cause remanded for a new trial. The inspector of the house of correction of Milwaukee county will remand the defendants to the custody of the sheriff of Milwaukee county, to be held by him until their custody be changed or they be discharged according to law.

STATE EX REL. COOPER and another vs. BRAZEE, Municipal Judge.

April 26—May 11, 1909.

Courts: Jurisdiction of supreme court: Mandamus: *Grounds: Existence of another remedy.*

1. The supreme court has jurisdiction by *mandamus* to require a municipal court to exercise its rightful jurisdiction, where refusal works injury to relator.
2. Where relators have an efficient remedy by writ of error to review a final order of a municipal court, the supreme court will not exercise its extraordinary jurisdiction by *mandamus* to correct such order.

[3. TIMLIN, KERWIN, and BARNES, JJ., are of the opinion that the statutory right of appeal from the district to the municipal court of Milwaukee county applies to judgments of conviction for violation of city ordinances, although the prosecution is by a civil action.]

MANDAMUS to ALVIN C. BRAZEE, judge of the municipal court of Milwaukee county: *Alternative writ quashed.*

Motion to quash an alternative writ of *mandamus* issued out of this court in exercise of its original jurisdiction.

For the relators there was a brief by *Kronshage, McGovern, Goff, Fritz & Hannan,* and oral argument by *Guy D. Goff.* They cited, besides other cases, *State ex rel. Hamilton v. Municipal Court,* 89 Wis. 358, 61 N. W. 1100; *Ogden v. Madison,* 111 Wis. 413, 87 N. W. 568; *Crocker v. State,* 60 Wis. 553, 19 N. W. 435; *State ex rel. Watson v. Clementson,* 133 Wis. 458, 113 N. W. 667; *Bookhout v. State,* 66 Wis. 415, 28 N. W. 179; *Platteville v. McKernan,* 54 Wis. 487, 11 N. W. 798; *Milwaukee v. Weiss,* 93 Wis. 653, 68 N. W. 390; sec. 3294, Stats. (1898); *Stoltman v. Lake,* 124 Wis. 462, 102 N. W. 920; *Chafin v. Waukesha Co.* 62 Wis. 463, 22 N. W. 732.

For the respondent there was a brief by *John T. Kelly,* attorney, and *Walter H. Bender,* of counsel, and oral argument by *Mr. Bender.*

Among other references upon the part of the respondent were the following: *State ex rel. Milwaukee E. R. & L. Co. v. Circuit Court,* 134 Wis. 301; *State ex rel. W. G. Taylor Co. v. Elliott,* 108 Wis. 163, 84 N. W. 149; *In re Mielke,* 120 Wis. 501, 98 N. W. 245; sec. 3047, Stats. (1898); sec. 21, art. I, Const.; *Stoppenbach v. Zehrlaut,* 21 Wis. 385; *Milwaukee v. Simons,* 93 Wis. 576; *State v. Allison,* 47 Wis. 548, 2 N. W. 1141; *Ammidon v. Smith,* 14 U. S. 447; *State ex rel. Dunlap v. Nohl,* 113 Wis. 15, 88 N. W. 1004; *Boscobel v. Bugbee,* 41 Wis. 59.

TIMLIN, J. *John Cooper* and *Louis Gorton* were on September 12, 1908, convicted in the district court for Milwaukee county of having violated an ordinance of the city of Milwaukee and sentenced to each pay a penalty of $25 and costs, or in default be committed to the house of correction of Milwaukee county until paid, not, however, exceeding a term of ninety days. On September 21, 1908, they appealed against this conviction to the municipal court of Milwaukee county, giving an undertaking with sureties for their appearance at the next regular term of the last-mentioned court and from time to time thereafter until discharged by law, to prosecute the appeal and abide the sentence of the court thereon, and in the meantime keep the peace. March 3, 1909, the prosecuting attorney moved to dismiss this appeal, assigning the following reasons: (1) This court has no jurisdiction to hear, try, and determine said appeal. (2) There is no provision of law whereby said appeal can be taken to and prosecuted in said court. (3) Said appeal should have been taken to the circuit court for Milwaukee county. Accompanying the motion papers for the dismissal of the appeal was a copy of the ordinance under which the relators were convicted, which read as follows:

"No person shall take, remove or carry away any stone, sand or earth from the beach or from the water within three hundred feet of high-water mark, along or near the shore of

Lake Michigan between the extreme northern limit and extreme southern limit of the city, under a penalty of not less than twenty-five dollars nor more than one hundred dollars."

Whereupon the municipal court "ordered and adjudged that the appeals of the above-named defendants and each of them from the district court of the county of Milwaukee to the municipal court for the city and county of Milwaukee be and hereby are dismissed for the following reasons, among others." Here follow the grounds contained in the moving papers heretofore stated.

The ordinance in question was before this court in *C. Beck Co. v. Milwaukee, ante,* p. 340, 120 N. W. 293, and, limited by construction as there stated, was held valid. Upon application of relators this alternative writ of *mandamus* was issued to the judge of the municipal court under the power conferred upon this court by sec. 3, art. VII, Const. The respondent moves to quash this writ for the reasons: (1) That the supreme court is without jurisdiction to issue the peremptory writ prayed for in the petition. (2) That neither the petition nor the alternative writ states facts showing that any such exigency exists which either calls for or justifies the exercise by the supreme court of its constitutional power of superintending control. (3) That neither the petition nor the alternative writ states facts showing that the relators are, or that either of them is, entitled to the writ of *mandamus* as prayed.

If by the objection to the jurisdiction of this court it is meant to confess the jurisdictional fact of refusal on the part of the municipal court to exercise its rightful jurisdiction and injury to the relators, it is hardly worth while to devote much time to this part of the motion. The constitutional provision in question, as construed by this court from the earliest times, confers quite an unlimited jurisdiction over the subject matter therein described. *Att'y Gen. v. Blossom,* 1 Wis. 317; *Att'y Gen. v. Railroad Cos.* 35 Wis. 425; *State ex rel. Fourth*

Nat. Bank v. Johnson, 103 Wis. 591, 79 N. W. 1081; *State ex rel. Umbreit v. Helms,* 136 Wis. 432, 118 N. W. 158.

But on the second ground of the motion to quash, as above quoted, it appears that the relators have a remedy by writ of error to review the final order of the municipal court dismissing the appeals of the relators, notwithstanding such appeals may be considered appeals in civil actions.

"The judgments of the municipal court in all cases *tried* before it may be examined and reviewed in the same manner as the judgments of the circuit court may be." Sec. 2499, Stats. 1898 (Laws of 1895, ch. 7).

This is a very broad grant of power, and, taken in connection with the constitutional provision forbidding the withholding of writs of error by the legislature, is very significant.

In *Cowles v. Neillsville,* 137 Wis. 384, 119 N. W. 91, the plaintiff in error was "convicted of violating a city ordinance." He appealed to the circuit court and the circuit court dismissed his appeal, and this court reversed on writ of error the order dismissing his appeal. The case also states the familiar principle that the right of appeal from inferior tribunals is favored in the law, and hence statutes conferring that right liberally construed. So this court has entertained a number of cases brought up from the municipal court of Milwaukee county on writ of error, among them prosecutions for violation of city ordinance, as in *Milwaukee v. Gross,* 21 Wis. 241, and *Clason v. Milwaukee,* 30 Wis. 316; also, criminal convictions, as in *Raynor v. State,* 62 Wis. 289, 22 N. W. 430, and *Wendel v. State,* 62 Wis. 300, 22 N. W. 435. The relators having an efficient remedy by writ of error, we ought not to exercise the extraordinary jurisdiction of this court. The majority of this court believe this decision should end here and express no opinion upon what follows. A minority of this court, including Justices KERWIN and BARNES and the writer, are of the opinion that what follows is proper to be at least considered and commented on by this court.

In support of the third ground above quoted for moving to quash the writ, the moving parties present that the municipal court has no jurisdiction of appeals from the district court in judgments imposing a penalty and alternative imprisonment for the violation of city ordinances. This question is very fully argued in the briefs. It is also made the basis of denying the first proposition treated in this opinion because it is in effect conceded, as it must be, that in criminal cases judgments of the municipal court are reviewed by writ of error in this court; but it is contended that this remedy does not exist with reference to the orders of the municipal court dismissing appeals to that court from the district court in civil actions, because no jurisdiction thereof by appeal or other mode of review is conferred by law upon the municipal court. The statute under which this court is authorized to issue a writ of error to the municipal court provides for a review of the judgments of that court "in all cases *tried* before it." It is therefore a fair inquiry whether these cases could be "tried before it" for the purpose of answering the points made by counsel as well as for the purpose of interpreting the statute, which apparently gives only the right of review to this court in cases tried before the municipal court, as well as for the purpose of deciding upon the third ground upon which it is sought to quash the writ. To leave this question undecided might also result in parties convicted of violation of ordinances being unable to appeal, or in their taking appeals to the wrong court and losing the opportunity to appeal before expiration of the ten days within which appeal is to be taken from the district court to the municipal court. When a question like this, so related to the principal question in the case, is made a special ground for quashing the alternative writ and is fully argued in the briefs, I think it is proper to be considered and discussed in the disposition of the motion to quash, although I am thoroughly in sympathy with the rule rigorously excluding *obiter dicta* sometimes followed by this court.

By ch. 218, Laws of 1899, as amended by ch. 72, Laws of 1907, it is provided that:

"Every person convicted before said district court may appeal from the sentence or judgment against him to the municipal court of said city and county of Milwaukee within ten days from the date of sentence or judgment against him. Said municipal court is empowered to hear, *try* and determine such appeals, and all provisions of law relative to appeals in criminal cases from justice courts and the trial and determination thereof shall apply to appeals from said district court to the municipal court."

Here the law stood at the time the appeals in question were dismissed. The reasoning upon which the municipal court declined jurisdiction by dismissing these appeals runs about like this: By the decision in *C. Beck Co. v. Milwaukee, ante,* p. 340, 120 N. W. 293, following the cases there cited in the construction of ch. 142, Stats. (1898), the prosecutions under the ordinance in question were civil actions. Although the district court is expressly given jurisdiction to hear and decide such prosecutions, yet the provisions for appeal above quoted are not broad enough, considered alone or in connection with statutes *in pari materia,* to authorize an appeal to the municipal court in such cases. This principally turns upon the expression "every person convicted may appeal." It is said that a person convicted is not one found guilty of violating an ordinance, but one found guilty of a crime or misdemeanor, and judicial definitions of the word "conviction" or "convicted" are quoted. The court and counsel evidently overlooked sec. 2514, Stats. (1898), not printed in full in these statutes, but found in the Annotated Statutes preceding them. This statute, relating to the municipal court, contains the words "all persons convicted in city prosecutions." The general charter law (secs. 925—56 and 925—67, Stats. 1898) speaks of persons convicted of violating ordinances. The same expression is used in *Cowles v. Neillsville,* 137 Wis. 384, 119 N. W. 91; *Schwartz v. Oshkosh,* 55 Wis. 490, 493, 13 N. W. 552; *State ex rel. Hamilton v. Municipal*

Court, 89 Wis. 358, 61 N. W. 1100; *People v. Hanrahan,* 75 Mich. 611, 613, 42 N. W. 1124, and in many other cases and statutes. The words "convicted before said district court" have no such narrow significance as attributed to them by counsel for the moving party. "Every person convicted" includes persons found guilty of violating ordinances and adjudged to pay a fine. Common usage and identical use of this expression in statutes, particularly in the statute above quoted referring to the municipal court, demonstrates this. If it is desirable to go abroad for definitions, see *Blair v. Comm.* 25 Grat. 850, where this definition received careful consideration. The municipal court therefore erred in dismissing the appeals. These appeals are cases which the statute authorizes to be tried in the municipal court. There is no serious difficulty in adapting the criminal procedure slightly modified to the trial of persons prosecuted for violating ordinances, even though such violation gives rise only to a civil action.

By the Court.—The alternative writ of *mandamus* is quashed, with costs against the relators.

BEALS, Plaintiff, vs. THE STATE, Defendant.

April 2—May 22, 1909.

Constitutional law: Distribution of governmental powers: Judicial powers: Assessment of inheritance tax: Recovery of tax paid: Construction of provisions of inheritance tax law: Taxation: Nature and power: Extent of power: Uniformity of taxation.

1. The order of a county court fixing the amount of inheritance tax and assessing the same against a decedent's estate is not *res adjudicata* on that question, requiring review by appeal directly therefrom, and barring the prosecution of an independent action to recover an unlawful imposition paid under protest.
2. The inheritance tax law is a law providing for the levying of a state tax, and while matters connected with determining the

value of the estate and assessment of the tax thereon are matters closely connected with the settlement of the estate and properly committed to the county court, which acts thereon in a judicial manner, nevertheless such acts of the county court are but steps in the enforcement of a tax law of the state rather than judgments in judicial controversies.

3. Inheritance taxation is constitutional on the ground that it is an excise taxation levied on the transfer of property and not on the property itself, and hence not subject to the rule of uniformity as applied to taxation of property, but subject alone to the general rule of uniformity—the law must operate alike on all persons similarly situated.

4. While by the words used in secs. 2, 3, ch. 44, Laws of 1903, transfers of property not exceeding $25,000 in value are taxed and no specific provision appears for taxation of the transfer of the first $25,000 of an estate exceeding that sum, other sections of the law justify a construction demonstrating a legislative intent to tax the first $25,000, except exemptions, in all estates, great or small, thereby making the statute reasonable and free from unjust discriminations.

5. The legislature is not limited to the levying of excise taxes upon privileges, transactions, or occupations which it alone authorizes and which it can entirely abolish, but may levy excise taxes upon the transfer or devolution of property.

6. The right to receive property by inheritance or will is an inherent right, subject to reasonable regulation and taxation, but not to abrogation by the legislature.

7. Sec. 1, art. VIII, Const., does not limit taxation to property only, and hence the legislature may levy excise taxes upon privileges, occupations, business transfers, or transactions.

8. In taxing property there can be no classification which interferes with substantial uniformity of rate based on value.

9. In excise taxation there may be proper classification and different rates applied to different classes; the term "uniformity of taxation" meaning simply taxation which acts alike on all persons similarly situated.

10. The inheritance tax levied by ch. 44, Laws of 1903, is not a tax upon property or property rights, but is purely an excise tax levied upon the "transfer" or transaction, and merely measured in amount by the amount of property transferred.

11. Neither the classification between relatives in various degrees and strangers nor the progressive features of the inheritance tax law (ch. 44, Laws of 1903) violate the true principles of classification, and that act does not violate the constitutional mandate of uniformity as applied to property taxation.

TIMLIN, J., dissents.

ACTION commenced in this court against the state. *Dismissed.*

For the plaintiff there were briefs by *Winkler, Flanders, Bottum & Fawsett,* and oral argument by *J. G. Flanders* and *C. F. Fawsett.* They contended, *inter alia,* that the addition to the tax assessed upon the plaintiff of any amount computed on the first $25,000 of the transfer was unwarranted by the terms of the law. The language of the statute is unambiguous, and hence the rule applies that it is only where the language of the statute is fairly capable of two or more meanings that any latitude of construction is allowable. *Mundt v. S. & F. du L. R. Co.* 31 Wis. 451; *Gilbert v. Dutruit,* 91 Wis. 661; *State ex rel. Heiden v. Ryan,* 99 Wis. 123; *Rossmiller v. State,* 114 Wis. 169; *Hoffmann v. Milwaukee E. R. & L. Co.* 127 Wis. 76, 81; *Mason v. Ashland,* 98 Wis. 540; Sutherland, Stat. Constr. (1st ed.) secs. 153, 157, 216; *Woodbury v. Berry,* 18 Ohio St. 456; *People ex rel. Plattsburgh v. Williams,* 47 App. Div. 88, 93. Courts cannot supply omissions in legislation in order to afford relief because they are supposed to exist. It is because of the legal uncertainty as to what the legislature might have said, where there is an entire omission to express in words a thought or an idea complete in itself and not necessarily controlled by anything it *has* said, that the rule is practically universal that a *casus omissus* in a statute will never be supplied by the courts. *U. S. v. U. P. R. Co.* 91 U. S. 72, 85; *Hobbs v. McLean,* 117 U. S. 567, 579; *Newhall v. Sanger,* 92 U. S. 761, 765; *U. S. v. Goldenberg,* 168 U. S. 95, 103; *Barnitz's Lessee v. Casey,* 7 Cranch, 456, 468; *Denn v. Reid,* 10 Pet. 524, 527; *Dewey v. U. S.* 178 U. S. 510, 521; *Blair v. Adams,* 59 Fed. 243, 247; *Salomon v. Salomon,* [1897] A. C. 22, 38; *U. S. v. Trans-Missouri F. Asso.* 166 U. S. 290, 318; *State v. Lancashire F. Ins. Co.* 66 Ark. 466; *Tynan v. Walker,* 35 Cal. 634; *Encking v. Simmons,* 28 Wis. 272, 276; *Comstock v. Bechtel,* 63 Wis. 656; *Harrington v. Smith,* 28 Wis. 43; *Regina v.*

Comm'rs, Potter's Dwarris, 195; *King v. Burrell,* 12 Ad. & El. 460, 468; *Lamond v. Eiffe,* 3 Q. B. 910; *Everett v. Wells,* 2 Scott, N. R. 525, 531; Dwarris, Statutes, 721; *Gwynne v. Burnell,* 1 Scott, N. R. 711, 739; *Buffham v. Racine,* 26 Wis. 449; *Rossmiller v. State,* 114 Wis. 169, 178. In construing laws it is the duty of the courts to effect the intention of the legislature, but this intention is to be searched for in the words the legislature has employed to convey it. The legislative intention must be derived from the words of the act and not from conjectures *aliunde. Schooner Paulina's Cargo v. U. S.* 7 Cranch, 52, 60; *Gardner v. Collins,* 2 Pet. 58, 86; *U. S. v. Goldenberg,* 168 U. S. 95, 103; *Burnham v. Milwaukee,* 98 Wis. 128, 132; *Phipps v. Wis. Cent. R. Co.* 133 Wis. 153. Any ambiguity in the law as to the amount of the tax imposed upon a given class must be resolved in favor of the class on whom the burden is imposed. It is the established rule of construction in construing a tax law which does not operate equally upon the people of the state at large, but only upon particular classes, that any ambiguity in the law as to the amount of tax imposed upon a given person or class must be resolved in favor of the class or citizen upon whom the burden is imposed. Dwarris, Statutes, 742, 749; *Gurr v. Scudds,* 11 Exch. 190; *U. S. v. Wigglesworth,* 2 Story, 369; *U. S. v. Watts,* 1 Bond, 580; *Fox's Adm'rs v. Comm.* 16 Grat. 1; *Partington v. Att'y Gen.* L. R. 4 H. L. 100, 122; *Hale's Estate,* 161 Pa. St. 181, 182, 28 Atl. 1071; *Eidman v. Martinez,* 184 U. S. 578. It is generally held that the rule of construction applicable to exceptions from the operation of a special tax law, such as the inheritance tax, is exactly opposite to that applicable to exemptions from general laws imposing taxes upon the people generally. *Lambard, Appellant,* 88 Me. 587; *Citizens' Nat. Bank v. Sharp,* 53 Md. 521; *Matter of Vassar,* 127 N. Y. 1, 12; *Matter of Enston,* 113 N. Y. 174; *U. S. v. Wigglesworth,* 2 Story, 369, 373. The right of the owner, upon his death, to trans-

mit his property to his heirs or devisees, and the right of such heirs or devisees, which thereupon immediately accrues, to receive the property, are property rights protected by all the guaranties of the constitution for the security of private property. The higher tax imposed upon the right to take a larger estate merely because it is larger is a violation of the uniformity rule of the state constitution provided by sec. 1, art. VIII. *Gelsthorpe v. Furnell,* 20 Mont. 299, 39 L. R. A. 170, 175; 27 Am. & Eng. Ency. of Law (2d ed.) 634; 23 Am. & Eng. Ency. of Law (2d ed.) 261; Cooley, Const. Lim. 58, 262; *Henshaw v. Foster,* 9 Pick. 312, 316; *State ex rel. Zillmer v. Kreutzberg,* 114 Wis. 530; *Chicago & W. I. R. Co. v. E. C. R. Co.* 115 Ill. 375, 385; *Rigney v. Chicago,* 102 Ill. 64, 77; *Eaton v. B. C. & M. R. Co.* 51 N. H. 504, 511; *Morrison v. Semple,* 6 Binn. 94, 98; *Gulf, C. & S. F. R. Co. v. Fuller,* 63 Tex. 467, 469; *Soulard v. U. S.* 4 Pet. 511, 512; *Bank of Toledo v. Toledo,* 1 Ohio St. 622, 661, 662; *Central R. Co. v. State Board,* 48 N. J. Law, 1; *In re Parrott,* 1 Fed. 481, 506; *Harbison v. Knoxville I. Co.* 103 Tenn. 421, 53 S. W. 955, 56 L. R. A. 316; *St. Louis v. Hill,* 116 Mo. 527, 533, 22 S. W. 861, 21 L. R. A. 226; *Pell v. Ball,* Speers Eq. 48, 83; *Kingsley v. Merrill,* 122 Wis. 185; *Allen v. Allen,* 114 Wis. 615, 626, 627; 1 Cooley, Taxation, 17; *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 37, 87; *State ex rel. v. Ferris,* 53 Ohio St. 314, 30 L. R. A. 218, 222; *Exchange Bank v. Hines,* 3 Ohio St. 1; 27 Am. & Eng. Ency. of Law (2d ed.) 605, 606. No case can be found anywhere in this country in which a progressive tax, graded according to the amount of the estate, has been sustained except upon the theory that the right to transmit or to receive property by inheritance is not a natural right, but a privilege granted by the legislature, and therefore not property within the meaning of the uniformity rule of the various state constitutions in relation to taxation of property. *Kochersperger v. Drake,* 167 Ill. 122; *Magoun v. Ill. T. & S. Bank,* 170 U. S. 283; *State v. Clark,* 30 Wash.

439, 71 Pac. 20; *Brown v. Elder,* 32 Colo. 527, 77 Pac. 853; *State ex rel. v. Ferris,* 53 Ohio St. 314; *Coal Co. v. Rosser,* 53 Ohio St. 12, 29 L. R. A. 386; *Estate of Cope,* 191 Pa. St. 1, 45 L. R. A. 316; *State ex rel. Garth v. Switzler,* 143 Mo. 287, 40 L. R. A. 280, 290; 27 Am. & Eng. Ency. of Law (2d ed.) 601, 602; *Matter of Swift,* 137 N. Y. 77, 83; *Knowlton v. Rock Co.* 9 Wis. 410; *Weeks v. Milwaukee,* 10 Wis. 242; *Lumsden v. Cross,* 10 Wis. 282; *State ex rel. Att'y Gen. v. W. L. & F. R. P. Co.* 11 Wis. 35, 40; *State ex rel. Reedsburg Bank v. Hastings,* 12 Wis. 47; *Slauson v. Racine,* 13 Wis. 398, 405. The power of taxation is an incident of sovereignty and needs no justification except the necessity of raising revenue for public purposes. But a law which cannot be upheld as a proper exercise of the taxing power cannot be helped out by the police power, unless it was intended as a police regulation and is within the legitimate scope of the police power. *State v. Donaldson,* 41 Minn. 74; *Huber v. Merkel,* 117 Wis. 355, 366; *State ex rel. Zillmer v. Kreutzberg,* 114 Wis. 530, 540; *State v. Heinemann,* 80 Wis. 253, 256; *Lawton v. Steele,* 152 U. S. 133, 137. A law which is in violation of the spirit of the constitution is without the power of the legislature and void, notwithstanding it may not conflict with the literal rule of any specific provision. *Janesville v. Carpenter,* 77 Wis. 288, 303; *Durkee v. Janesville,* 28 Wis. 464; *Bull v. Conroe,* 13 Wis. 233; *State ex rel. Kellogg v. Currens,* 111 Wis. 431, 435; *State v. Redmon,* 134 Wis. 89.

The *Attorney General* and *Russell Jackson,* deputy attorney general, for the defendant, contended, *inter alia,* that this court has no jurisdiction of the subject matter of the action. It can acquire jurisdiction of the subject matter of this action only through successive appeals from the county and circuit courts to this court. *State ex rel. Att'y Gen. v. Portage City W. Co.* 107 Wis. 441; *Weigley v. Coffman,* 144 Pa. St. 489; *Foster v. The Richard Busteed,* 100 Mass. 409; *Mc-*

Neeley v. Hyde, 46 La. Ann. 1083; *Withers's Adm'r v. Sims,* 80 Va. 651; *Hungerford v. Cushing,* 8 Wis. 324; *Reed v. Jones,* 15 Wis. 40; *Atkinson v. Richardson,* 15 Wis. 594; *Ryan v. Martin,* 18 Wis. 672; *Roberts v. Weadock,* 98 Wis. 400, 405; *Jackson ex dem. Grignon v. Astor,* 1 Pin. 137; *Att'y Gen. ex rel. Cushing v. Lum,* 2 Wis. 507; *Gale v. Best,* 20 Wis. 44; 26 Am. & Eng. Ency. of Law (2d ed.) 488; *Raymond v. State,* 54 Miss. 562; *State v. Lancaster Co. Bank,* 8 Neb. 218; *Chicago, M. & St. P. R. Co. v. State,* 53 Wis. 509; *State ex rel. Hovey v. Noble,* 118 Ind. 350; *Att'y Gen. v. McDonald,* 3 Wis. 805; *Janesville v. Carpenter,* 77 Wis. 288, 301; *Berrett v. Oliver,* 7 Gill & J. 191; *People ex rel. Butler v. Saginaw Co.* 26 Mich. 22; *Taylor v. Place,* 4 R. I. 324, 253; *Tate's Ex'rs v. Bell,* 4 Yerg. 202; *Bates v. Kimball,* 2 D. Chip. 77; *Ervine's Appeal,* 16 Pa. St. 256; *Watkins v. Lessee of Holman,* 16 Pet. 25, 60, 61; *Prentis v. Atlantic C. L. Co.* 211 U. S. 210, 226. The general understanding of a law and constant practice under it for a long period by all the officers of government whose duty it has been to execute it, unquestioned by any suit brought or public or private action instituted to test or settle its construction in the courts, is very strong, if not conclusive, evidence of its true meaning and application and that they are such as it has received. *Scanlan v. Childs,* 33 Wis. 663; Cooley, Const. Lim. (5th ed.) 84; *Faribault v. Misener,* 20 Minn. 396; *Harrington v. Smith,* 28 Wis. 43; *Wright v. Forrestal,* 65 Wis. 341, 348, 349; *Dean v. Borchsenius,* 30 Wis. 236; *Bloxham v. Consumers' E. L. & S. R. Co.* 36 Fla. 519, 541; *Westbrook v. Miller,* 56 Mich. 148. The conclusion reached by this court in the *Nunnemacher Case* (129 Wis. 190) as to the validity of succession taxes under constitutional provisions similar to ours is in perfect harmony with the current of authority elsewhere, although the reasoning by which it is supported is somewhat at variance therewith. *In re Wilmerding,* 117 Cal. 281; *In re Stanford,* 160 Cal. 112; *In re Magnes,* 32

Colo. 527; *Gallup's Appeal,* 76 Conn. 617; *Hopkins's Appeal,* 77 Conn. 644; *Billings v. Illinois,* 188 U. S. 97; *Walker v. People,* 192 Ill. 106; *Herriott v. Potter,* 115 Iowa, 648; *State v. Hamlin,* 86 Me. 495; *Tyson v. State,* 28 Md. 577; *State v. Dalrymple,* 70 Md. 294; *Pingree v. Auditor Gen.* 120 Mich. 95; *Stellwagen v. Wayne Probate Judge,* 130 Mich. 166; *Gelsthorpe v. Furnell,* 20 Mont. 299; *State ex rel. Slabaugh v. Vinsonhaler,* 74 Neb. 675, 105 N. W. 472; *Executors of Eury v. State,* 72 Ohio St. 448; *In re Lipschitz,* 14 N. Dak. 622, 95 N. W. 157; *Grossman v. Hancock,* 58 N. J. Law, 139; *In re Hoffman,* 143 N. Y. 327; *In re Vanderbilt,* 172 N. Y. 69; *Finnen's Estate,* 196 Pa. St. 72; *State v. Alston,* 94 Tenn. 674; *Dixon v. Ricketts,* 26 Utah, 215; *In re Joyslin's Estate,* 76 Vt. 88; *Peters v. Lynchburg,* 76 Va. 927; *State v. Clark,* 30 Wash. 439; *Knowlton v. Moore,* 178 U. S. 41; *Snyder v. Bettman,* 190 U. S. 249; *Plummer v. Coler,* 178 U. S. 115, 131; *Vanderbilt v. Eidman,* 196 U. S. 480, 490; *Magoun v. Ill. T. & S. Bank,* 170 U. S. 283; *Kochersperger v. Drake,* 167 Ill. 122; *Clark v. Titusville,* 184 U. S. 329; *Nettleton's Appeal,* 76 Conn. 235; *Bridgeport T. Co.'s Appeal,* 77 Conn. 657; *In re Estate of McGhee,* 105 Iowa, 9; *Herriott v. Bacon,* 110 Iowa, 342; *Gilbertson v. McAuley,* 117 Iowa, 522; *South Carolina v. U. S.* 199 U. S. 437, 458.

WINSLOW, C. J. The plaintiff, having paid a large inheritance tax under protest, presented her claim to the legislature for a refund of the tax on the ground that the inheritance tax law was unconstitutional. The claim was rejected, and she now brings action in this court under the terms of sec. 3200, Stats. (1898), to recover the tax so paid, and the state demurs to her complaint. At the threshold of the case the state claims that the order of the county court of Milwaukee county fixing the amount of the tax and assessing the same against the estate is *res adjudicata* on the question and that the plaintiff

should have appealed directly therefrom, and hence cannot prosecute this independent action. We do not regard this point as well taken. The inheritance tax law is a law providing for the levying of a state tax. For very palpable reasons of convenience some of the matters concerning the administration of the law are committed to the county court in which the estate is being administered. Among these matters are the determining of the value of the estate and the assessment of the tax thereon. While these matters are closely connected with the settlement of the estate and the court acts upon them in a judicial manner, and thus it may properly be said, as held in *Nunnemacher v. State,* 129 Wis. 190, 108 N. W. 627, that the acts are so far judicial in their nature that their performance may properly be committed to the county court, still it seems plain that both of these acts are really but steps in the enforcement of a tax law of the state rather than judgments in judicial controversies. Hence we conclude that the preliminary objection must be overruled.

Upon the merits of the case the only question is as to the constitutionality of the inheritance tax law (ch. 44, Laws of 1903, as amended by ch. 249, Laws of 1903). This question was presented to the court in very full and able arguments in the case of *Nunnemacher v. State,* 129 Wis. 190, 108 N. W. 627. The case was given long and careful consideration in this court, and the present case might perhaps be now decided by simply referring to the *Nunnemacher Case* and applying the doctrine of *stare decisis.* However, owing to the fact that several new and interesting arguments are now presented, and in deference to the ability and earnestness of the counsel who have presented the present case for the plaintiff, we have deemed that it was our duty to thoroughly re-examine the question and review the former holding carefully in order to correct the ruling then made, if convinced that it was erroneous.

Inheritance taxation was held to be constitutional in the

Nunnemacher Case on the ground that it is excise taxation levied on the transfer of property and not on the property itself, and hence not subject to the rule of uniformity as applied to taxation of property, but subject alone to the general rule of uniformity in legislation, namely, the rule that there must not be unjust discrimination or purely arbitrary classification, or, in other words, that the law must operate alike on all persons similarly situated.

The first argument made in the present case is one not made in the former case, and is in effect that, while the law (ch. 44, Laws of 1903) in sec. 2 provides for the taxation of the transfer of estates not exceeding in value $25,000, it provides in sec. 3 in effect that the transfer of the first $25,000 in an estate exceeding that sum shall not be taxed, and that only the transfer of the amount exceeding $25,000 shall be subject to taxation. If this be true, the law is manifestly bad under the ruling in the case of *Black v. State,* 113 Wis. 205, 89 N. W. 522, because it discriminates unjustly between persons in the same situation. The law provides in sec. 2 that when the property or interest transferred exceeds in value the exemption allowed by the law, but *does not exceed* in value $25,000, the tax imposed shall be according to a table of rates following, which are called the primary rates, and range from one to five per cent. according to the nearness of relationship of the beneficiary to the decedent. In sec. 3 it is provided that, "when the amount of the clear value of such property or interest exceeds $25,000, the rates *upon such excess* shall be" according to a certain table of rates progressive in their nature as the amount of the property increases. Then follows a table of exemptions applicable to all estates. It is very plain that, if secs. 2 and 3 be considered alone, there is a hiatus. By the words used, transfers of property not exceeding $25,000 in value are taxed, while no specific provision appears for taxation of the transfer of the first $25,000 of an estate exceeding that sum. Exact construction of the

language of the two sections can lead to no other result. There are, however, other provisions of the law which deserve and must receive consideration before a construction so manifestly unintended should be adopted. If, by the express language of other provisions, it conclusively appears that the intent of the legislature was to tax the first $25,000 (except exemptions) in all estates, great or small, and that the apparent hiatus in secs. 2 and 3 is the result merely of an inaccurate and careless use of language, then the court will be justified in construing the law as the legislature intended it, notwithstanding the lapse in secs. 2 and 3.

We think the language of other sections of the act actually forbids such a construction of secs. 2 and 3 as the plaintiff contends for. It is very significant that sec. 4, which provides for exemptions, is a general section fixing the exemptions to be allowed in all estates, both great and small, and is intended to cover the whole subject of exemptions. It is manifestly unreasonable to suppose that the legislature imagined, when they provided this careful and complete code of exemptions, that they had already made an enormous exemption of $25,000 in favor of all beneficiaries who were fortunate enough to receive more than that sum. But the first section of the act is quite conclusive. This section is the section which imposes the tax and enumerates the transfers which come within the law. Leaving out matters immaterial here, it provides that "a tax shall be and is hereby imposed upon *any* transfer of *any* property, real, personal or mixed, or *any* interest therein, . . . in the following cases: [here follow five clauses defining the transfers which are to be subject to the tax.] The tax so imposed shall be upon the clear market value of such property at the rates hereinafter prescribed, and only upon *the excess of the exemptions* hereinafter granted." No warrant can here be found for leaving out any transfer from the operation of the tax, whether large or small, except only transfers of property thereinafter spe-

cifically exempted. The tax is imposed upon *any* transfer of *any* property except the exemptions, and this must be held to be controlling. After so sweeping a declaration of the purpose of the law, it would take something more than a technical hiatus in the details of the act to take property out of the provisions of that section which is evidently intended to be the effectual and potent section. This construction makes the law reasonable and constitutional and relieves the legislature of any charge of inconsistency or favoritism, and we have no hesitation in adopting it.

Another new argument is made in the present case to this effect: It is said that, because this court held in the *Nunnemacher Case* that the right to inherit or devise property was a natural right which could not be entirely abrogated by the legislature, therefore it was a property right, and hence an inheritance tax must logically be held to be a tax upon a property right and subject to the provision that it must be absolutely uniform. It is admitted that the universal current of authority holds that inheritance taxes are not taxes levied upon property, though their amount may be measured by the value of the property involved, but are excise taxes levied upon the transfer of property, or, as it is sometimes said, upon the transaction. But it is said (as the fact is) that the decisions so holding have all been rendered by courts which hold that the right to receive property by inheritance or will is the creation of the legislature and may be totally abrogated at will, and as this court holds that these rights are natural rights, not subject to abrogation by the legislature, the principle cannot logically apply.

The conclusion does not follow from the premises. Taxes frequently are levied upon transactions or occupations which are matters of inherent and natural right, as well as upon transactions and occupations which are made lawful or possible only by virtue of statutory law. In other words, the legislature is not limited to the levying of excise taxes upon

privileges, transactions, or occupations which it alone authorizes and which it can entirely abolish. Mr. Cooley says (2 Cooley, Taxation, 3d ed. 1094): "What is true of property is true of privileges and occupations also. The state may tax *all,* or it may select for taxation certain classes and leave others untaxed." In the absence of special constitutional restrictions, the only limitations are that there should be no unjust discrimination or arbitrary classification, and, in case of the exercise of inherent rights, that taxation shall be reasonable, and shall not be so great as to result in a practical taking away of the right.

The two arguments which we have treated are practically the only arguments advanced in the present case which were not advanced and fully considered in the *Nunnemacher Case.* Our conclusion being that they cannot prevail, we have left only a reconsideration of the points made in the *Nunnemacher Case* and now reiterated in the present case. It seems that it would avail little to again traverse the ground gone over in that case. The justices who concurred in the decision of that case, after reconsidering the whole subject, are of the opinion that the decision was right upon all points involved. So far as the writer is concerned, he feels that it would be impossible for him to state the positions taken by the court any more clearly than they are there stated. If that opinion be not a satisfactory and fairly logical meeting of the contentions made against the law, the writer feels that he would not be able to write one now.

The points there decided and now reaffirmed may be briefly recapitulated thus:

(1) The right to receive property by inheritance or will in an inherent right, subject to reasonable regulation and taxation, but not to abrogation by the legislature.

(2) Sec. 1, art. VIII, of our constitution does not limit taxation to property only, and hence the legislature may levy

excise taxes upon privileges, occupations, business transfers, or transactions.

(3) As to the taxation of property, there can be no classification which interferes with substantial uniformity of rate based upon value.

(4) As to excise taxation, there may be proper classification and different rates applied to the different classes, and the term "uniformity of taxation" means simply taxation which acts alike on all persons similarly situated.

(5) The inheritance tax levied by ch. 44, Laws of 1903, is not a tax upon property or property rights in any sense, but purely an excise tax levied upon the "transfer" or transaction, and merely measured in amount by the amount of property transferred.

(6) Neither the classification between relatives in various degrees and strangers nor the progressive features of the law violate the true principles of classification, and as excise taxation is only subject to the general principle that all persons similarly circumstanced shall be treated alike, and not to the rule of uniformity as applied to property taxation, the law does not violate the constitutional mandate in this respect.

It follows that the general demurrer to the complaint on the ground that it does not state a cause of action must be sustained, and, it being apparent that no amendment can be made which will remedy the defect, judgment for the defendant dismissing the action, with costs, will be entered.

By the Court.—It is so ordered

TIMLIN, J. (*dissenting*). After the enactment of the statutes here considered (chs. 44 and 249, Laws of 1903) and at the general November election of 1908, the constitution of Wisconsin was amended by adding the following:

"Taxes may also be imposed on incomes, privileges and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided."

In view of this amendment the decision of the instant case *perhaps* loses something in importance, and I shall not in this dissent discuss the matter at length. Prior to said amendment the constitutional mandate was:

"The rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall direct." Const. art. VIII, sec. 1.

My view of duty forbids silent acquiescence in the unfortunate judicial history of this section of the constitution. But I shall merely state conclusions. In the interpretation of this provision of the constitution I exclude as irrelevant or remote all discussion of the antiquity, equity, or comparative desirability of a progressive inheritance tax, grant that under this section reasonable classification of the objects of taxation based upon substantial differences is *ex necessitate* permissible, grant that the rule of taxation need be uniform only within the proper class, and grant that classification of transfers by gift, will, or the laws of descent according to the degree of relationship of the donee, devisee, or heir to the decedent is permissible classification. I believe in the views expressed in the following quotation:

"Nor can I find any definition of property which does not include the power of disposition and sale as well as the right of private use and enjoyment. Thus Blackstone says (1 Comm. 138): 'The third absolute right of every Englishman, is that of property, which consists in the free use, enjoyment and *disposal* of all his acquisitions, without any control or diminution, save only by the laws of the land.' Chancellor Kent says (2 Comm. 320): 'The exclusive right of using and *transferring* property follows as a natural consequence from the perception and admission of the right itself.' And again (p. 326): 'The power of *alienation of property* is a necessary incident to the right, and was dictated by mutual convenience and mutual wants.' By another author property is defined as an 'exclusive right to things, containing not only a right to use those things, but a right to dispose of them, either by exchanging them for other things or giving them away to any

other person without consideration, or even throwing them away.' Bouv. Law Dict. tit. PROPERTY. These definitions are in accordance with the general sense of mankind. Indeed, if any one can define property eliminated of its attributes, incapable of sale, and placed without the protection of law, it were well that the attempt should be made." *Wynehamer v. People,* 13 N. Y. 378, 396.

However it may be elsewhere, under any scheme of government like that of the United States, whose organic law declares that private property shall not be taken for public use without just compensation, or like that of the state of Wisconsin, whose organic law declares that the property of no person shall be taken for public use without just compensation, I would reject as extravagant and fantastical the notion put forth in *Eyre v. Jacob,* 14 Grat. 422, and *Pullen v. Comm'rs,* 66 N. C. 361, and some other cases, that the state has power to create an universal escheat by taking away from the owner of property the right of disposal thereof by gift, will, or other testamentary transfer, and repealing all statutes of descent in force at the time of the adoption of the constitution. To take away, either by absolute interdict or indirectly, the power of disposal of a thing is to take property. *Stratton Claimants v. Morris Claimants,* 89 Tenn. 497, 15 S. W. 87, 12 L. R. A. 70; *Block v. Schwartz,* 27 Utah, 387, 76 Pac. 22, 65 L. R. A. 308. To take away the right to acquire property by barter, purchase, gift, or inheritance is to deprive one of liberty within the meaning of that word as used in Magna Charta and in the constitution of Wisconsin. The right of the heir to have the property of his ancestor was one of the "liberties" secured by the great charter. Par. 2–6, 18, 26, 27, 37, 52, 56, 63. An heir was not then understood to mean one entitled to take by statute of descent, but the term meant a child or relative by blood. The term is used by Littleton and his predecessors in this sense: *"Solus Deus hæredem facere potest, non homo."* Coke upon Littleton, lib. 1, c. 1, of Fee Simple (sec. 1, 7. b). The "law of the land"

as it exists in Wisconsin secures this right of disposal on the part of the owner and this "liberty" to acquire by inheritance, or by gift or purchase, against any power of the legislature except reasonable police regulation, or a taking with full compensation, and except the power of taxation for legitimate public purposes. Amendm. V, XIV, Const. of U. S.; Const. of Wis. art. I, secs. 1, 13.

I therefore agree with *Nunnemacher v. State,* 129 Wis. 190, 108 N. W. 627, that the power of the legislature to impose a succession or inheritance tax cannot be rested upon any right or power to forbid the making of wills or gifts *causa mortis* or to repeal the law of descent of property. But I think every state has the power to impose taxes for proper public purposes upon all taxable property or rights created, protected, and upheld by its laws in every case not forbidden by the state or the federal constitution. This includes a succession or inheritance tax.

In the interpretation of a constitution the state must be considered perpetual, and, because all men must die, a succession or inheritance tax is when the same rate is applied to all within the same lawful class upon an uniform rule. The "tax" imposed by the statute in question is not an indirect tax which one may incur or not incur at his option and which can be shifted, but is inevitable and without incidence, and is a percentage upon the value of the property. It is therefore not analogous to a stamp duty or an excise tax, but is a direct tax. Its essential nature cannot be altered by the legislature or the courts arbitrarily giving it a name. I am convinced that, while the legislature of Wisconsin had power to impose a succession or inheritance tax, such tax came within the command of the constitution that "the rule of taxation shall be uniform." A progressive tax is the very antithesis of a tax by uniform rule. Classification of property according to amount or value for the purpose of taxation is contrary to this command of the constitution. This provision ex-

pressly forbids a progressive rate of taxation within a legitimate class, and does not permit evasion of its command by the simple expedient of unconstitutional classification according to amount or value. The cases of *Magoun v. Ill. T. & S. Bank,* 170 U. S. 283, 18 Sup. Ct. 594; *Knowlton v. Moore,* 178 U. S. 41, 20 Sup. Ct. 747; and *Kochersperger v. Drake,* 167 Ill. 122, 47 N. E. 321, cited in *Nunnemacher v. State,* 129 Wis. 190, 108 N. W. 627, in support of the progressive features of this taxation, relate to essentially different constitutional provisions, and with reference to the constitutional provision heretofore quoted they do not, in my judgment, meet the question presented. I think the act in question in its progressive features which are based solely upon the amount or value of the property transferred, is unconstitutional.

STATE, Respondent, vs. PABST and others, Appellants.

April 3—May 22, 1909.

Taxation: Inheritance taxes: Constitutional law: Equal protection of laws: Statutes: Construction by courts of state from which adopted: Time of accrual of tax: Appraisement: Rate of taxation: Contingent interests: Defeasible interests: Transfers subject to tax: "In contemplation of death:" Witnesses: Competency: Privileged communications: Information acquired by a physician: Documentary evidence: Public records: Official certificates: Certificate of death: Values: Corporate stock: Appeal and error: Findings, when disturbed: Penalties: "Necessary litigation or other unavoidable delay."

1. Ch. 44, Laws of 1903, is a proper exercise of the taxing power of the state; taxes levied thereunder are valid and in the nature of excise taxes, imposed on the transfer of property, and not a tax upon property within the meaning of sec. 1, art. VIII, Const.; and the act does not violate the constitutional guaranties of the equal protection and the uniformity in operation of the laws.

2. The provisions of ch. 44, Laws of 1903, are in substance those of the New York transfer tax act, and hence, so far as applicable, the decisions of courts of that state are an aid in construing the Wisconsin statute.
3. The inheritance tax imposed by ch. 44, Laws of 1903, is imposed on the transfer at the time of the death of the transferor and rests as a lien upon the property so transferred until paid.
4. Under the provisions of ch. 44, Laws of 1903, the terms declaring when the tax accrues and when it becomes due and payable are used as equivalents, and prescribe that the tax accrues at the time of the transfer, except as to estates so limited, conditioned, dependent, or determinable upon future contigencies that their value cannot be presently ascertained; that as to those the tax becomes due and payable and accrues at the time of the actual possession and enjoyment.
5. The provisions of ch. 44, Laws of 1903, for discount if tax is paid within one year, and for charging interest and penalties on delayed payments, are not discriminatory and impossible of performance, since ample provision is made for parties to complete an appraisal and have the assessment and determination of the amount of the tax fixed within the time allowed for payment.
6. Ch. 44, Laws of 1903, is not invalid because it imposes a tax on transfers limited to vest on contingencies which may never happen, to persons not in being or ascertainable, or on transfers of defeasible estates which may never go to the persons who are taxed, since the law does not operate to enforce payment of the tax on such transfers until the beneficiary comes into the actual possession and enjoyment thereof.
7. Neither does payment of the tax by the present owners of defeasible estates operate to unjustly tax them, in view of the provisions of subd. 3, sec. 13, ch. 44, Laws of 1903, for reimbursement should it happen that such estates are abridged, defeated, or diminished.
8. Payment of the inheritance tax by the first beneficiary of a defeasible estate is not in the nature of an advancement, since the transfer confers the benefit enjoyed until the happening of the contingency, imposes the tax only on the interest actually received and enjoyed, and when the estate is terminated the tax is then imposed on the person then receiving the property, with provision for a refund of overpayments.
9. Beneficiaries under a will and deed of gift, entitled to take property and income subject to annual payments to testator's widow unless she exercise an option to take a share in lieu thereof, and to similar payments for the support of a child during minority, have a right to the property and income from the donor's death,

and the value of their interests at that time is ascertainable for the purpose of fixing the amount of the inheritance tax; the law providing a means for calculating the value of the interest of the widow and child.

10. The beneficiary of a transfer in trust, on condition that the beneficiary shall receive only the income thereof during life, unless the beneficiary shall have a child which shall attain a certain age, takes an estate dependent upon conditions or contingencies which may extend or change the life estate into a fee, and, under subd. 5, sec. 13, ch. 44, Laws of 1903, the tax should be assessed and collected at the lowest possible rate under the conditions on which it passes at the time of the transfer, subject to reimbursement out of the corpus of the estate transferred in event that no more than a life interest is enjoyed.

11. The words "in contemplation of death" as used in ch. 44, Laws of 1903, refer to an expectation of death which arises from such a bodily or mental condition as prompts disposal of property and bestowal upon those regarded as entitled to the bounty, and includes gifts *inter vivos* as well as *causa mortis*.

12. Ch. 44, Laws of 1903, does not restrict persons in their right to transfer property in all legitimate ways, but taxes all transfers which are accomplished by will, the intestate laws, and transfers made prior to death which can be classed as similar in nature and effect,—which are impressed with the characteristics of a devolution made at the time of the donor's death.

13. A death certificate made by a physician according to the requirements of secs. 1024, 1024*a*, Stats. (1898), is a public record, and its contents are not privileged.

14. Such certificate is admissible as a public record within the calls of sec. 4160, Stats. (1898), as *prima facie* evidence of the material facts stated therein. *Rohloff v. Aid Asso.* 130 Wis. 61, distinguished.

15. Evidentiary facts, for which see opinion, warrant a finding that a deed of trust executed about six months before the grantor's death was made in contemplation of death.

16. Where the evidence of value of corporate stock is sufficient to sustain the conclusions of the trial court in its appraisement for the purpose of inheritance taxation, such findings must stand.

17. Litigation to determine doubtful and perplexing questions as to liability of transferees for inheritance tax, and delays occasioned thereby, constitute "necessary litigation or other unavoidable delay" within the calls of sec. 6, ch. 44, Laws of 1903, and under such circumstances the penalty of ten per cent. interest for nonpayment should not be imposed.

TIMLIN, J., dissents.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

This appeal is from the judgment of the circuit court for Milwaukee county in favor of the state and against *Gustav Pabst, Frederick Pabst, Jr., Maria Goodrich,* and *Emma Soehnlein* for $28,353.72 each. The case had been appealed from the county court to the circuit court, and the judgment rendered is for the amount of the inheritance tax found due and unpaid upon the transfer of the estate of Frederick Pabst, deceased, after making allowance for payments already made.

Frederick Pabst resided in Milwaukee and died there testate on January 1, 1904. On July 17, 1903, he executed and delivered a deed of trust and conveyed to the trustees for the purposes set up in the deed 2,840 shares of stock in the Pabst Brewing Company, a corporation organized under the laws of this state. The stock of the Pabst Brewing Company was divided into 10,000 shares of the par value of $1,000 each. The trust deed was as follows:

"I, Frederick Pabst, of Milwaukee, Wisconsin, for and in consideration of love and affection, do hereby give and transfer twenty-eight hundred and forty (2,840) shares of the capital stock of the Pabst Brewing Company, a corporation, as per stock certificate No. 902, this day duly issued to my wife, Maria Pabst, and my sons, *Gustav G. Pabst* and *Frederick Pabst, Jr.,* in trust, subject to the limitations and terms and conditions herein stated:

"*First.* I reserve to myself the dividend which shall be earned and declared on said stock for the year 1903.

"*Second.* I reserve to myself the right to control the vote of said stock on all questions and at all elections which shall occur in said corporation during my lifetime, and hereby direct said trustees, at all such times, to vote said stock in such manner and for such parties or purpose as I shall direct. After my decease, said trustees shall vote the stock held by them under this instrument, as they or a majority of them shall determine.

"*Third.* Said trustees shall collect and receive the dividends paid on said stock from time to time. The dividend for the year 1903 is to be paid to me. All subsequent dividends are to be paid over by said trustees during my life and that of my wife, Maria Pabst, or either of us, one fourth to my son *Gustav G. Pabst,* one fourth to my daughter *Maria Goodrich,* one fourth to my son *Frederick Pabst, Jr.,* and one fourth to my daughter *Emma Soehnlein,* and their respective heirs; provided, however, that in case any of said parties shall die without leaving surviving issue, his or her share of said dividends shall be paid in equal distribution to the other of said parties or their respective heirs.

"*Fourth.* Upon the decease of both myself and my wife, Maria Pabst, the surviving trustees shall transfer one fourth of said stock to *Gustav G. Pabst,* one fourth to *Maria Goodrich,* and one fourth to *Frederick Pabst, Jr.,* or their respective heirs in case of the death of any of said parties. In case my said daughter, *Emma Soehnlein,* shall, at such time, have a child or children living, such child or the oldest of such children being not less than ten years of age, then the remaining one fourth of said stock shall be transferred to said *Emma Soehnlein,* if she be then living, and said trust shall thereupon cease. If at such time said *Emma Soehnlein* shall have no living issue, or her issue shall not have attained the aforesaid age, said trust shall continue as to one fourth of said stock, and the dividends thereof shall be paid to said *Emma Soehnlein* during her life, provided, that if she have a child or children and the same or any of them attain the age of ten years, she being living, said stock shall then be transferred to her and the trust cease. In case of the death of said *Emma Soehnlein* during the continuance of said trust, leaving issue surviving her, such issue shall receive said dividends during life and said stock shall be transferred to such issue upon the arrival of the oldest thereof at the age of twenty-one years. In case of the death of said *Emma Soehnlein* without issue surviving her, or the subsequent decease of all such issue prior to the transfer of said stock, pursuant to the provisions herein contained, the same shall be transferred to my other children herein named, or their respective heirs by representation. The book value of said stock is four million dollars, and this

transfer is intended, subject to the limitations stated, as a gift of one million dollars to each of my said children.

"Done at the city of Milwaukee, this 17th day of July, 1903. [Signed] FRED PABST.

"In the presence of

"F. C. Winkler.

"C. W. Henning."

On the day the trust deed was executed the deceased surrendered to the Pabst Brewing Company certificates for 2,840 shares of its stock and caused new certificates for the same number of shares to be issued to the trustees named in the deed. On the same day he also made and executed his last will and testament, disposing of all the rest of his property. The will provided as follows:

"I, Frederick Pabst, of the city of Milwaukee, in the state of Wisconsin, being of sound mind and memory, do hereby revoke all testamentary dispositions heretofore made by me, and declare my last will and testament as follows:

"*First.* I give and bequeath to my beloved wife, Maria Pabst, my homestead, consisting of the premises fronting on Grand avenue, in the city of Milwaukee, and extending to Wells street, house and grounds, outbuildings and stables, with all their contents and all furnishing belonging thereto and in use therewith, both useful and ornamental, to have and to hold during her lifetime, and with power to dispose of any of the personalty without accountability.

"*Second.* I give to my said wife the annual sum of fifty thousand dollars ($50,000), to be paid to her as long as she shall live, in such instalments and at such times as she may desire.

"*Third.* Subject to the above provisions I give, devise, and bequeath all the property which I may have at the time of my decease, or be in any way interested in, to my executors, in trust during the life of my said wife, the trustees out of the income of said property to pay her said sum of fifty thousand dollars ($50,000) per annum; and also out of said income or said property to them conveyed, to pay all proper expenses for the suitable support and education of my granddaughter and adopted daughter, Emma Maria Pabst, com-

monly called Elspeth Pabst, until she shall arrive at the age of twenty-one years, and to divide the net income of said property after said payments, annually, or at such times as may be convenient, in equal shares among my children, *Gustav G. Pabst, Maria Goodrich, Frederick Pabst, Jr.,* and *Emma Soehnlein,* or their respective issue; in case of the death of any of them, such issue to take a parent's share by right of representation. In case any of my children shall die without leaving issue, such income shall be divided among the remaining children or their issue. After her arrival at the age of twenty-one years, said Elspeth shall take an equal share with the other of said children in said distribution of income, subject to the same conditions above provided.

"*Fourth.* Upon the decease of my said wife the entire estate shall be divided into as many parts as there are children then living, counting the living descendants of any deceased child as the representative of its parent in case of the latter's decease. Said parts shall be equal, except that there shall be transferred to one of said parts, designed for the benefit of my granddaughter, Elspeth, as provided in paragraph sixth of this instrument, such number of shares of the capital stock of the Pabst Brewing Company as shall represent a book value of one million dollars, according to the regularly kept books of said Pabst Brewing Company, so that said part shall exceed each of the other parts by the amount of said shares of stock. The reason for this discrimination is, that I transfer, by way of gift, a like amount in book value of said stock for the benefit of each of my children, *Gustav G. Pabst, Maria Goodrich, Frederick Pabst, Jr.,* and *Emma Soehnlein,* contemporaneously with the making of this will. One of said equal parts shall be paid over and transferred to my son *Gustav G. Pabst* or his heirs; one to my daughter *Maria Goodrich* or her heirs; and one to my son *Frederick Pabst, Jr.,* or his heirs.

"*Fifth.* In case my said daughter, *Emma Soehnlein,* shall, at the time of the decease of my wife, have a child or children living, such child or the oldest of such children being not less than ten years of age, then and in such case said *Emma Soehnlein* shall be entitled to and receive one of said equal parts of my estate. If at the time of the decease of my wife said *Emma Soehnlein* shall have no living issue, or her issue

shall not have attained the aforesaid age, then said part of my estate shall continue to be held in trust by my executors and trustees, said *Emma* receiving the income thereof until a child of said *Emma,* either living at the time of my wife's decease or thereafter born to her, shall arrive at the age of ten years, whereupon, such child being living, said *Emma* shall become entitled to and receive one part of my estate. In case said *Emma* shall not have a child of said age at the time of my wife's death, and no child of hers shall, after that time, reach said age, then said part of my estate shall continue to be held in trust by my executors and trustees during the life of said *Emma,* and the income thereof annually paid to her, and the body or principal of said part shall, in such case, upon her decease, go in equal shares to my other children or their respective issue in the same manner and subject to the same conditions herein provided in reference to other parts of my estate. In case said *Emma* shall die leaving a child or children before the transfer to her of said part of my estate pursuant to the provisions hereof, the net income of said part shall thereafter be paid to such child or children in such equal shares until the oldest shall attain the age of twenty-one years, whereupon said part shall be transferred and paid over to such child or children in equal shares. In case all of said children shall die before reaching said age and without leaving lawful issue, said part of my estate shall be disposed of in the same manner as if said *Emma* had died without leaving surviving issue. If issue of any child survive, it shall take by representation what its parent would have taken if living.

"*Sixth.* The remaining part of my estate, being the one increased by the transfer thereto of shares of stock as hereinbefore provided, shall, upon the decease of my wife, continue to be held in trust by my executors and trustees, provided said Elspeth be living at that time; and the annual income thereof shall be paid to said Elspeth during her life. In case of said Elspeth's death without leaving issue surviving her, said part of my estate shall be added in equal shares to the remaining parts thereof and disposed of as parts thereof as heretofore directed. If said Elspeth shall have died prior to the decease of my wife, leaving a child or children who shall survive my wife, or if she shall die after my wife's death, leaving a child

or children, then also said part of my estate shall continue to be held in trust by my executors and trustees, and the annual income thereof shall be paid to such issue in equal shares for the term of twenty-one years after the death of said Elspeth, and shall thereupon be paid to such child or children and the issue of any of them who may have died, according to the rule of representation. In case of the death of said Elspeth without leaving issue surviving her, or the extinction of her issue prior to the expiration of twenty-one years from the time of her decease, said part of my estate shall be added in equal shares to the other parts as herein directed and pass to my other said children or their respective issue or heirs, subject to the same conditions and limitations herein prescribed as to said other parts. In case said Elspeth shall attain the age of forty-five years and shall then have living a child or children, the whole of said part of my estate shall pass and be transferred to her.

"*Seventh.* In making distribution both of the income and the principal of my estate as above directed, advancements heretofore made by me to any of my children and charged against them on my private books, shall be taken into account and charged respectively against the share of the child to whom they were made, reducing such share by the amount thereof. This provision, however, shall not apply to certain shares of stock of the Pabst Brewing Company which I have heretofore made over by way of gift to my sons, *Gustav G. Pabst* and *Frederick Pabst, Jr.*

"*Eighth.* I give to my wife, at her option, in lieu of the aforesaid fifty thousand dollars ($50,000) per annum, an equal one-sixth share of my entire estate, such option to be exercised by her in writing within one year from the time of my death. In case she shall so exercise this option, my executors and trustees shall, instead of paying to her said fifty thousand dollars ($50,000) per annum, pay to her the income of such one-sixth of my estate and transfer and make over to her the body or part thereof whenever she may so request. This my will to remain in other respects unaltered, and such portions of such one-sixth share as she may not have requested to be transferred to her to pass as part of my estate as herein provided.

"*Ninth.* I nominate and appoint my beloved wife, Maria

Pabst, and my sons, *Gustav G. Pabst* and *Frederick Pabst, Jr.*, executors of this my will and trustees of the trust thereby created; and I hereby confer upon said executors and trustees full power and authority to manage and control said property according to their judgment and discretion, and to sell and dispose of any portions thereof, including any real estate, also said homestead, during the life of my wife, if she shall desire it and consent thereto. And I give them full authority to invest the trust properties in such manner as they shall deem best, with no responsibility for losses, provided they act honestly and in good faith. In case any of said executors or trustees shall die, the surviving two shall have authority to nominate a successor, who shall be clothed with the same authority as was enjoyed by the deceased executor or trustee; provided, that until the legal appointment of such third executor or trustee, the survivors shall have full power and authority in all respects to act under the provisions of this will. I request that no bonds shall be required from my said executors or trustees. And I direct that no inventory of my estate shall be required to be filed in the county court or any public office; but it shall be the duty of said trustees to keep, for the benefit of all parties interested in my estate, full and accurate books of account of my said estate and all their dealings therewith."

The will was admitted to probate February 3, 1904, and on the same day the appraisers in the probate proceedings were appointed and letters testamentary issued to the executors named in the will. About May 20, 1904, the appraisers were furnished with an inventory of the estate by the executors, and on December 31, 1904, they completed their appraisal and made their report valuing the estate at $2,734,475. The executors, under the advice and as directed by their counsel, computed the inheritance tax upon the transfer of property under the will on this appraisal at $58,714.72, after deducting the five per cent. discount allowed for payment within one year from the testator's death, and on the same day paid this sum to the treasurer of Milwaukee county, upon condition that they would have a right

to demand restitution if the tax should be found invalid. December 13, 1905, the secretary of state petitioned for a re-appraisal of the estate, and on the following 27th day of September a supplemental inventory was filed, whereby omitted items of the property of the estate, amounting to $180,833, as found by the court, were added to the value of the estate. On October 3, 1906, Maria Pabst, the widow of the testator, died. Letters of administration upon her estate were issued to the Wisconsin Trust Company of Milwaukee, and this company was also named in her stead as one of the executors of the will and as a trustee under the trust deed of Frederick Pabst, deceased. The executors in making their estimate of the value of the estate for payment of the inheritance tax omitted some property belonging to the estate which passed under the will, but this was afterward added. They listed the stock of the brewing company which belonged to the estate at its par value and took no account of the stock transferred by the deed of trust.

The county court valued the stock in the brewing company at $1,408.45 per share. This was somewhat less than the value as carried on the books of the company, but was the value derived from the statement in the trust deed that the value of the shares of stock so placed in trust was $4,000,000. It appeared from the evidence in the circuit court that the stock in the brewing company was not for sale in the market generally, and that it was held very largely by members of the family. There was evidence of the amount paid per share in five transfers of stock during the six years before the death of the testator and of the amounts paid per share in five transfers thereafter. The prices at which these transfers were made varied from $1,050 per share to $1,500 per share. Evidence showed that the book value of the corporation increased from $11,262,731.51 on January 1, 1896, to $14,810,728.60 on January 1, 1904, the date of Frederick Pabst's death, and that it was $15,347,643.46 on January 1,

1905, and $15,753,286.36 on January 1, 1906, the two years succeeding his death. The dividends declared and paid upon the stock from 1896 to 1904 averaged three and two-ninths per cent., and the net earnings, according to the books, were as follows: 1897, $852,087; 1898, $653,891; 1899, $829,300; 1900, $801,165; 1901, $706,565; 1902, $718,042; 1903, $804,170; 1904, $829,903; 1905, $845,841. It appeared that the good will of the corporation was not carried upon the books as an asset, and that the various purchases of real estate were carried as assets at the cost price. Experts on the market value of stocks, called by the defense, variously estimated the stock as having a market value of from eighty per cent. of its face value to par value. As bearing on the question of whether or not the trust deed had been executed in contemplation of death, there was evidence that the deceased had suffered from diabetes for fifteen years, that he had watched the progress of the disease during that whole period, and that frequent urinalyses kept him informed of his physical condition and the state of the malady. He was frequently examined by physicians and had them in almost constant attendance and on their advice dieted and went to various health resorts in Europe and this country seeking relief. In the early part of the year 1903, in the hope of restoring his impaired health or at least of checking the decline of his strength, he went to the milder climate of southern California. While there he was very seriously ill and his son was sent for. Early in the summer he came home to Milwaukee accompanied by this son and his wife. After his return his declining vitality necessitated that his physicians frequently consult together on his case. On July 17, 1903, while in this physical condition, he executed the deed of trust and his will. Later in the year his condition became so serious that the leading specialist in the country on the disease from which he suffered was called by his family. Generally speaking, he was of a cheerful, optimistic

disposition, loving to his family and friends, and, although probably better informed concerning his serious condition than any but a professional man or specialist, was cheerful and encouraging, although he told some of his attendants that he required their assistance to prolong his life. For some time his sons had had the active management of his business with his constant advice and participation with a view to acquaint them with the business and to prepare them to manage the large interests of the family without his assistance.

The court found that the testator died January 1, 1904; that he left surviving him certain heirs, the facts as to the probate of the will, the death of the widow, and the substitution of the Wisconsin Trust Company as executor in her place; that the deceased had been afflicted for about fifteen years with diabetes; that he knew during the last year of his life that he could not recover from the diabetes and the intercurrent diseases from which he suffered; that he therefore executed the trust deed in contemplation of death; that it was intended to take full effect only upon his death; and that the deceased reserved to himself for a period the dividends of the stock thus conveyed by him and retained the right to vote and control the stock during his lifetime. An inventory of the estate as disposed of by the trust deed and by the will is among the findings, and the amount of the debts, funeral expenses, and expenses of administration to be deducted from the value of the estate before computing the inheritance tax is found to be $212,247.55.

As conclusions of law the court found that the property transferred by the deed of trust was so transferred in contemplation of death and was intended to take effect at the time of death of the donor; that the tax upon the property transferred by the deed and by the will accrued January 1, 1904, the time of the death of the donor; that there should be imposed a penalty of ten per cent. per annum of the amount of the tax due and unpaid, computed from the date of the death of the

deceased to the time of appeal from the judgment of the county court; that interest at the rate of six per cent. should be allowed upon the amount due for taxes after the date of the appeal; that the county court of Milwaukee county was the proper tribunal to fix and determine and to apportion the amount of the inheritance tax to be paid by the estate or the beneficiaries of the trust deed and the will; and that there was due as such tax from *Gustav Pabst, Frederick Pabst, Jr., Maria Goodrich,* and *Emma Soehnlein,* each, the sum of $28,328.72.

This is an appeal from the judgment entered on the findings.

Geo. D. Van Dyke, of counsel, for the appellants, contended, *inter alia,* that the act in question imposes a tax not on the property but on the transfer of the property, or, in other words, a tax is imposed on the transfer or right to receive each separate estate transferred to individual legatees or donees. *Matter of Westurn,* 152 N. Y. 93, 99; *Matter of Vanderbilt,* 172 N. Y. 69, 73; *Matter of Hoffman,* 143 N. Y. 327, 331, 332; *Matter of Corbett,* 171 N. Y. 516; *Matter of Costello,* 189 N. Y. 288, 292; *Matter of Sloane,* 154 N. Y. 109; McElroy, Transfer Tax, secs. 279, 329, 334, 335, 503; Dos Passos, Inheritance Tax Law, §§ 57, 58; *Matter of Brez,* 172 N. Y. 609; *Matter of Hosack,* 39 Misc. 130, 78 N. Y. Supp. 983; *Miller v. Tracy,* 86 N. Y. Supp. 1024; *In re Le Brun's Estate,* 80 N. Y. Supp. 486. If the Wisconsin act be construed as authorizing the taxing of expectant estates, contingent or defeasible, at the time of the death of the testator, and before the contingent remaindermen are ascertainable, and before such estates are vested in possession or enjoyment, and as making the tax, both on the life tenant's interest and on the interest of the contingent remaindermen, payable forthwith out of the property and imposing the tax as a lien on the property, it cannot be supported on the theory of the nature of the tax adopted in the *Nunnemacher Case* (129

Wis. 190), as it would tax an incomplete transfer before it is received and before there are persons *in esse* capable of receiving it and when it might not be received at all. So construed, in so far as the payment of the tax depleted the property and reduced the life tenant's income, it would amount to taking the life tenant's property without due process, contrary to the state and national constitutions. So construed, it would require an appraisal of an estate or interest before any transfer—before there were persons *in esse* capable of receiving; and before it could be ascertained when it would be received or whether it would be received at all; and before it could be ascertained what amount of property, if any, would be received at the uncertain future date. An appraisal under such circumstances would be difficult, if not impossible. 27 Am. & Eng. Ency. of Law (2d ed.) 352, 354; *Matter of Vanderbilt,* 172 N. Y. 69, 75, 76; *Matter of Brez,* 172 N. Y. 609, 612. The Wisconsin act may be construed as imposing the tax after the amount of the tax has been fixed by an appraisal and as authorizing the postponement of the taxing of estates in expectancy which are contingent or defeasible until the persons entitled thereto can be ascertained and the amount received by such persons definitely determined. McElroy, Transfer Tax, sec. 716; 27 Am. & Eng. Ency. of Law (2d ed.) 340, 351, 352, 355; *Herold v. Blair,* 158 Fed. 804, 806; *People v. Koenig,* 37 Colo. 283, 85 Pac. 1129; *English's Estate v. Crenshaw* (Tenn.) 110 S. W. 210; *Lynch v. Union T. Co.* 164 Fed. 161, 165; *Matter of Gordon,* 186 N. Y. 471, 483; *McKenney v. Minahan,* 119 Wis. 651; *Matter of Gihon,* 169 N. Y. 443; *Matter of Westurn,* 152 N. Y. 93; *Matter of Zefita,* 167 N. Y. 280, 283; *Matter of Clinch,* 99 App. Div. 298, 180 N. Y. 300; *Welch v. Sackett,* 12 Wis. 243; *Matter of Wolfe,* 89 App. Div. 349, 85 N. Y. Supp. 949; *Matter of Lansing,* 182 N. Y. 238; *In re Estate of Stone,* 132 Iowa, 136, 109 N. W. 455; *In re Haggerty,* 112 N. Y. Supp. 1017; *Matter of Sloane,* 154 N. Y. 109,

115; Cooley, Taxation (3d ed.) 597; Hill, Taxation, 290, 291, §§ 2, 3; *U. S. v. Marion T. Co.* 143 Fed. 301; *Clapp v. Mason,* 94 U. S. 589, 592; *Mason v. Sargent,* 104 U. S. 689, 693; *Land T. & T. Co. v. McCoach,* 129 Fed. 901; *Tilghman v. Erdman,* 131 Fed. 651; *Eidman v. Tilghman,* 136 Fed. 141, 143, aff'd 203 U. S. 580; *Gill v. Austin,* 157 Fed. 234; *People v. McCormick,* 208 Ill. 437, 70 N. E. 350; *Vanderbilt v. Eidman,* 196 U. S. 480; *Shanley v. Herold,* 141 Fed. 423, 146 Fed. 20; *Howe v. Howe,* 179 Mass. 546, 61 N. E. 225; *Stevens v. Bradford,* 185 Mass. 439; *Billings v. People,* 189 Ill. 472; *Harrison v. Johnston,* 109 Tenn. 245, 70 S. W. 414, 416; *Commonwealth's Appeal,* 127 Pa. St. 435, 439, 17 Atl. 1094; *Comm. ex rel. v. Barker,* 211 Pa. St. 610, 615, 61 Atl. 253; *State ex rel. Hale v. Probate Court,* 100 Minn. 192, 110 N. W. 865; *State ex rel. Basting v. Probate Court,* 101 Minn. 485, 112 N. W. 878; *Dunbar v. Dunbar,* 190 U. S. 340, 345, 23 Sup. Ct. 757; *Matter of Lansing,* 182 N. Y. 238; *Matter of Ramsdill,* 190 N. Y. 492, 495; *Kingsbury v. Chapin,* 196 Mass. 533, 82 N. E. 700; *Eury's Ex'rs v. State,* 72 Ohio St. 448, 74 N. E. 650; *Nunnemacher v. State,* 129 Wis. 223; *Matter of Smith,* 40 App. Div. 480, 58 N. Y. Supp. 128; *Matter of Seaman,* 147 N. Y. 69, 74, 75; *In re Naylor's Estate,* 105 N. Y. Supp. 667. No proper appraisal has been made of such interest or estates as were appraisable at the time the court acted in the matter, and the assessment of all future contingent estates which could not practically be appraised at said time should have been deferred until the parties entitled thereto came into the actual possession or enjoyment thereof on the happening of the contingencies upon which they were limited. *Ayers v. Chicago T. & T. Co.* 187 Ill. 42, 58 N. E. 318; *Matter of Davis,* 149 N. Y. 539; *Matter of Vanderbilt,* 172 N. Y. 69; *Matter of Brez,* 172 N. Y. 609. The act in question is an unjust and unreasonable exercise of the taxing power and violates the guaranties of the state constitution

and of the XIVth amendment of the national constitution. (a) It attempts to impose a transfer tax—a tax on the right to receive—when there is no transfer. *People v. McCormick,* 208 Ill. 437, 70 N. E. 350, 353; *Matter of Vanderbilt,* 172 N. Y. 69, 76. (b) The act attempts to make a forced loan from parties presently entitled to a defeasible estate of the amount of the tax imposed on the transfer of the remainder. (c) It attempts to impose on one person the tax in respect to a transfer to another. 27 Am. & Eng. Ency. of Law (2d ed.) 354; *Fitzgerald v. Rhode Island H. T. Co.* 24 R. I. 59, 52 Atl. 815; *State ex rel. Hale v. Probate Court,* 100 Minn. 192, 110 N. W. 865; *Herold v. Shanley,* 146 Fed. 20, 24; *Rogers-Ruger Co. v. Murray,* 115 Wis. 267, 270; *Hartman v. Greenhow,* 102 U. S. 672; *Knoxville T. Co. v. McMillan,* 111 Tenn. 521, 65 L. R. A. 296; *Boston v. Beal,* 51 Fed. 306; *Matter of Tracy,* 179 N. Y. 501. (d) It attempts to impose a penalty before an opportunity is afforded the taxpayer to pay the tax. *County of Redwood v. Winona & St. P. L. Co.* 40 Minn. 512, 42 N. W. 473; *Gallup v. Schmidt,* 154 Ind. 196, 56 N. E. 443; *State v. Jersey City,* 37 N. J. Law, 39; *Lufkin v. Galveston,* 73 Tex. 340, 11 S. W. 340, 341; *Louisville & N. R. Co. v. Comm.* 94 S. W. 655; *Gager v. Prout,* 48 Ohio St. 89, 26 N. E. 1012; *Victoria L. Co. v. Rives,* 115 La. 996, 40 South. 382; *U. S. T. Co. v. New Mexico,* 183 U. S. 535; *Litchfield v. Webster Co.* 101 U. S. 773; *Lake Shore & M. S. R. Co. v. People,* 46 Mich. 193, 212; 2 Cooley, Taxation (3d ed.) 903; *Matter of Davis,* 149 N. Y. 539, 547; McElroy, Transfer Tax, 192–197. (e) The penalties imposed by the act in question, as construed by the court below, are of such a nature as to intimidate and deter a taxpayer from either contesting the validity of the law or seeking its construction in the courts or resisting an overvaluation of his property by the appraisers or by the court. *Bonnett v. Vallier,* 136 Wis. 193, 116 N. W. 885; *Ex parte Young,* 209 U. S. 123. The

act unreasonably and unjustly discriminates between persons similarly constituted or situated: (a) Discrimination between specific and money legacies. (b) Discrimination between life tenants. *Matter of Sloane,* 154 N. Y. 109. (c) Discrimination in the matter of valuation. *Lynch v. Union T. Co.* 164 Fed. 161, 167; *Shanley v. Herold,* 141 Fed. 423, 429; Judson, Taxation, §§ 292, 463, 470. The act is prohibited by secs. 31, 32, art. IV, Const., for two reasons: (a) It is a special law by reason of the exemptions it contains. *Chicago & N. W. R. Co. v. Forest Co.* 95 Wis. 80; *Milwaukee Co. v. Isenring,* 109 Wis. 9; *Clark v. Janesville,* 10 Wis. 135, 180; Sutherland, Stat. Constr. §§ 116, 120, 127–129; Words & Phrases, 6577–6584; note in 21 Am. St. Rep. 780; 32 Am. L. Reg. 721, 725; *State ex rel. Baltzell v. Stewart,* 74 Wis. 620; *State ex rel. Church Mut. Ins. Co. v. Cheek,* 77 Wis. 284; *State ex rel. Turner v. Bell,* 91 Wis. 271; *Budd v. Hancock,* 66 N. J. Law, 133, 48 Atl. 1023, 1024; *State ex rel. Sanderson v. Mann,* 76 Wis. 469; *Dundee M. T. Inv. Co. v. School Dist.* 19 Fed. 359, 371; *Estate of Cope,* 191 Pa. St. 1, 71 Am. St. Rep. 740; *Black v. State,* 113 Wis. 205; *Nunnemacher v. State,* 129 Wis. 190. (b) If regarded as a general law, it is not uniform in its operation throughout the state, by reason of its exemptions and also by reason of its discriminations above mentioned. *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 37; *Chicago & N. W. R. Co. v. State,* 128 Wis. 553; *Magoun v. Ill. T. & S. Bank,* 170 U. S. 283; *Pollock v. Farmers' L. & T. Co.* 157 U. S. 429; *Kelley v. State,* 6 Ohio St. 269; *State ex rel. v. Bargus,* 53 Ohio St. 94, 53 Am. St. Rep. 628; *State ex rel. v. Spellmire,* 67 Ohio St. 77, 65 N. E. 619; *Milwaukee Co. v. Isenring,* 109 Wis. 9, 28.

T. W. Spence, of counsel, for the appellants, contended, *inter alia,* that the evidence clearly shows the maximum value of the brewery stock at the time of testator's death to have been par. (a) The statute on this subject is subd. 6, sec. 1,

ch. 44, Laws of 1903, which provides: "Basis of tax: (6) The tax so imposed shall be on the *clear market value* of such property," etc. (b) In the ascertainment of the meaning of the words "market value" we may safely apply the criterion furnished by the statutes relating generally to the valuation of property for the purpose of taxation; they, being *in pari materia,* should be considered and perhaps be controlling. Secs. 1052, 1055, Stats. (1898); *Walker v. People,* 192 Ill. 106; *Matter of Smith,* 71 App. Div. 602, 76 N. Y. Supp. 185. (c) In the absence of other clear and satisfactory evidence the par value of the stock is presumed to be the true value. *Moffit v. Hereford,* 132 Mo. 513; *Meinell v. Kirkpatrick,* 29 Kan. 679, 685. (d) The general rule on the construction of the inheritance tax law is applicable in determining the value of the property to be taxed. The rule is this: "Doubt should be resolved in favor of the taxpayer as against the taxing power." *Matter of Fayerweather,* 143 N. Y. 114; *Matter of Harbeck,* 161 N. Y. 211; *Matter of Enston,* 113 N. Y. 174. (e) The testimony of experts was competent. *Murray v. Norwood,* 77 Wis. 405; *Whitney v. Thacher,* 117 Mass. 523; 1 Whart. Ev. § 446; *Am. F. & F. Co. v. Settergren,* 130 Wis. 338, 342; *Erd v. C. & N. W. R. Co.* 41 Wis. 65, 68; *Baxter v. C. & N. W. R. Co.* 104 Wis. 307. The deed of gift was not made in contemplation of death within the meaning of the inheritance tax law. Ch. 44, Laws of 1903, not only copies the New York inheritance tax law which was in force in 1899, omitting the unconstitutional feature pointed out in *Black v. State,* 113 Wis. 205, but copies changes therein made subsequently by the legislature of that state. The rule of adoption by Wisconsin of the construction of the New York courts applies, therefore, to all the decisions of such courts prior to the year 1903. The New York courts repeatedly held, prior to 1899 and prior to 1903 with a single qualification, that the clause of the law making taxable transfers in contemplation of death

referred only to gifts *causa mortis*. *Matter of Seaman*, 147 N. Y. 69; *Becker v. Chester*, 115 Wis. 90, 127; *Matter of Masury*, 28 App. Div. 580, 159 N. Y. 532; *Matter of Edgerton*, 35 App. Div. 125, 158 N. Y. 671; *Matter of Swift*, 137 N. Y. 77; *Matter of Hoffman*, 143 N. Y. 327; *Matter of Spaulding*, 49 App. Div. 541, 158 N. Y. 671; *In re Bostwick*, 160 N. Y. 489; *Matter of Baker*, 83 App. Div. 530, 178 N. Y. 575; *Matter of Bullard*, 76 App. Div. 207. In *Matter of Cornell*, 66 App. Div. 162, 169, the court holds that the only exception to the rule that the inheritance tax statute applies only to gifts *causa mortis* is where fraud or an attempt to cheat the law is shown. See, also, *Matter of Birdsall*, 22 Misc. 180; *Matter of Palmer*, 117 App. Div. 360. A careful study of the Illinois cases will show that while apparently in conflict with the New York cases it is rather in form than substance. *Rosenthal v. People*, 211 Ill. 306, 307; *Merrifield v. People*, 212 Ill. 400; *People v. Kelley*, 218 Ill. 515. The transfer of testator's interest in the stock was *in præsenti* and was a gift *inter vivos*. *Rountree v. Dixon*, 105 N. C. 350, 11 S. E. 158; *Fetters v. Humphreys*, 19 N. J. Eq. 471, 479; *Cooper v. Jackson*, 4 Wis. 537; *Calkins v. Equitable B. & L. Asso.* 126 Cal. 531, 59 Pac. 30; *Dickerson's Appeal*, 115 Pa. St. 198, 8 Atl. 64; *Stone v. Hackett*, 12 Gray, 227; *Zillmer v. Landguth*, 94 Wis. 607; *Danforth v. Oshkosh*, 119 Wis. 262, 278, 279; Thornton, Gifts, sec. 435; *Vandenberg v. Palmer*, 4 K. & J. 204. If any interest was taxable it is only the interest reserved, viz. voting power. *People v. Kelley*, 218 Ill. 509. The attempted retention of the right to control the vote of the stock was ineffectual as a legal right. Sec. 1760, Stats. (1898); 2 Cook, Corp. § 611; 1 Beach, Priv. Corp. § 306; Shepaug, Voting Trust Cases, 60 Conn. 553, 579; *Robotham v. Prudential Ins. Co.* 64 N. J. Eq. 673, 701; *Kreissl v. Distilling Co.* 61 N. J. Eq. 5, 14; *Clowes v. Miller*, 60 N. J. Eq. 179, 186; *White v. Thomas I. T. Co.* 52 N. J. Eq. 178.

Hugh Ryan, of counsel, for the appellants. [Mr. Ryan's brief is entirely an argument on the facts.]

The *Attorney General* and *T. C. Richmond* and *R. W. Jackman,* special counsel, for the respondent. They contended, *inter alia,* that the good will of a business is taxable. Fallows, Transfer Tax, 13; *Matter of Jones,* 69 App. Div. 237. For definitions of good will, see *Washburn v. Nat. W. P. Co.* 81 Fed. 17; *Matter of Brandreth,* 28 Misc. 468, 59 N. Y. Supp. 1092; *Rowell v. Rowell,* 122 Wis. 1. Good will is a valuable asset. *Lindeman v. Rusk,* 125 Wis. 210; *In re Keahon's Estate,* 113 N. Y. Supp. 926. The certificate of death of testator was properly admitted. Sec. 2, ch. 415, Laws of 1903, amending sec. 1024, Stats. (1898); sec. 1024*a,* Stats. (1898), as amended by ch. 384, Laws of 1903; subd. 24, sec. 3, ch. 4, Milwaukee City Charter; sec. 4160, S. & B. Ann. Stats.; sec. 4160, R. S. 1878; *McKinstry v. Collins,* 74 Vt. 147, 52 Atl. 438; *Krapp v. Metropolitan L. Ins. Co.* 143 Mich. 369, 106 N. W. 1107; *Hennessy v. Metropolitan L. Ins. Co.* 74 Conn. 699, 52 Atl. 490; *National Council v. O'Brien,* 112 Ill. App. 40; *Reynolds v. Prudential Ins. Co.* 88 Mo. App. 679; *Keefe v. Supreme Council,* 55 N. Y. Supp. 827; *Markowitz v. Dry Dock E. B. & B. R. Co.* 33 N. Y. Supp. 702; *Woolsey v. Trustees,* 84 Hun, 236, 115 N. Y. Supp. 573; *Knights Templar & M. L. Ind. Co. v. Crayton,* 110 Ill. App. 648, 70 N. E. 1066, aff'd 209 Ill. 550; *Howard v. Ill. T. & S. Bank,* 189 Ill. 568, 572; 9 Am. & Eng. Ency. of Law (2d ed.) 882, 883; 1 Greenl. Ev. (14th ed.) §§ 483, 484; 24 Am. & Eng. Ency. of Law (2d ed.) 187. A gift must be complete and irrevocable to avoid taking effect at death. *Reish v. Comm.* 106 Pa. St. 521. Possession defined. *Rice v. Frayser,* 24 Fed. 460, 463; *Sullivan v. Sullivan,* 66 N. Y. 37, 41; *Booth v. Small,* 25 Iowa, 177, 181; 28 Am. & Eng. Ency. of Law (2d ed.) 238. Enjoyment defined. *Clark v. Maguire,* 16 Mo. 302, 314. The possession of the stock under the trust deed was not absolute until after

testator's death. *In re Johnson's Estate,* 19 N. Y. Supp. 963; *In re Sharer's Estate,* 73 N. Y. Supp. 1057; *In re Cruger,* 66 N. Y. Supp. 636; *Appeal of Siebert,* 110 Pa. St. 329, 1 Atl. 346; *Wright's Appeal,* 38 Pa. St. 507; *Reish v. Comm.* 106 Pa. St. 521; *Appeal of Du Bois,* 121 Pa. St. 368, 15 Atl. 641; *Line's Estate,* 155 Pa. St. 378, 26 Atl. 728. The right to vote upon stock can be separated from the ownership of the stock unless the objects sought to be reached by the separation are unlawful. *Smith v. S. F. & N. P. R. Co.* 115 Cal. 584, 35 L. R. A. 309; *Mobile & O. R. Co. v. Nicholas,* 98 Ala. 92, 12 South. 723, 731, 732; *Brightman v. Bates,* 175 Mass. 105, 55 N. E. 809; *Chapman v. Bates,* 61 N. J. Eq. 658, 47 Atl. 638; *Clowes v. Miller,* 60 N. J. Eq. 179, 47 Atl. 345. The following cases have held inheritance tax laws constitutional: *Nunnemacher v. State,* 129 Wis. 190; *Knowlton v. Moore,* 178 U. S. 41, 59, 60; *Kochersperger v. Drake,* 167 Ill. 122; *Minot v. Winthrop,* 162 Mass. 113, 123, 124; *State v. Alston,* 94 Tenn. 674, 682; *State ex rel. Fath v. Henderson,* 160 Mo. 190; *Campbell v. California,* 200 U. S. 87; *State ex rel. Foot v. Bazille,* 97 Minn. 11, 106 N. W. 93; *Matter of McPherson,* 104 N. Y. 306, 10 N. E. 685; *In re Hickok's Estate,* 78 Vt. 259, 62 Atl. 724; *Magoun v. Ill. T. & S. Bank,* 170 U. S. 283, 42 L. Ed. 1037. The time of the transfer by will or the intestate laws is at the death of the decedent, and the tax occurs at that time. *Matter of Sloane,* 154 N. Y. 109; *Matter of Davis,* 149 N. Y. 539; *Matter of Westurn,* 152 N. Y. 93, 102; *Matter of Green,* 153 N. Y. 223, 228; *McCurdy v. McCurdy,* 197 Mass. 248, 83 N. E. 881; *People ex rel. Att'y Gen. v. Rice,* 40 Colo. 508, 91 Pac. 33; *Shelton v. Campbell,* 109 Tenn. 690, 72 S. W. 112; *Line's Estate,* 155 Pa. St. 378, 26 Atl. 728; *People v. Prout,* 53 Hun, 541, 6 N. Y. Supp. 457; *Commonwealth's Appeal,* 34 Pa. St. 204; *Comm. v. Bousman* (Pa. 1879) 12 Lanc. Bar, 189.

SIEBECKER, J. The judgment imposing a transfer tax on the beneficial interests of testator's children and grandchild is assailed upon the ground of the invalidity of ch. 44, Laws of 1903, as amended by ch. 249, Laws of 1903, in that this law is an unjust and unreasonable exercise of the taxing power, and in that it violates limitations of the state and federal constitutions.

The constitutionality of this law was considered and upheld in the cases of *Nunnemacher v. State,* 129 Wis. 190, 108 N. W. 627, and *Beals v. State, ante,* p. 544, 121 N. W. 347. In these cases it was decided that the act was a proper exercise of the taxing power of the state; that the tax was a valid one; that it is one in the nature of an excise tax, imposed on the transfer of property by will, the intestate law of the state, or "by deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death;" that it was not a tax on property within the meaning of sec. 1, art. VIII, of the state constitution; and that the law is not violative of the constitutional guaranties of the equal protection and the uniformity in operation of the laws. The necessity for further consideration and discussion of these questions does not arise on this appeal. So far as they are involved, we shall here regard them as ruled and determined in those cases and shall consider that no further comment or discussion is required.

The appellant urges that the law is invalid upon additional grounds, namely, that it attempts to impose a tax on transfers limited to vest on contingencies which may never happen or to persons not in being or ascertainable, in making the tax due and payable forthwith out of the property transferred, by compelling parties to pay such tax on defeasible estates which they may never own, and in contemplating the payment of penalties before any opportunity is afforded to pay

the tax. The provisions of the law thus assailed will be considered so far as the facts and circumstances of the transfers involved in this estate require.

The object and purpose of the law being to impose a tax on the transfer of the property of testators, intestates, grantors, bargainors, or vendors who transfer property in contemplation of death or by a transfer intended to take effect in possession or enjoyment at or after such death, directs all consideration of it to the right of the state to impose this burden on the transfer by which decedent's property devolves on those who take it under such transfers. The right of the state to exercise this power by the imposition of direct taxes on property is therefore excluded from consideration, since the tax is in no sense a direct tax on property, but is an excise tax imposed on the transfer. See *Nunnemacher* and *Beals Cases* and *State v. Railway Cos.* 128 Wis. 449, 108 N. W. 594. The provisions of the law are in substance those of the New York transfer tax act; hence, so far as applicable, the decisions of the courts of that state construing the law are to be resorted to for aid in construing the one in question. In *Matter of Westurn,* 152 N. Y. 93, 102, 46 N. E. 317, in speaking of the right of the state to impose such a tax, it is said:

"The devolution of the property and the right of the state have their origin at the same moment of time. The ascertainment of the value of the taxable interest and the fixing of the tax necessarily takes place subsequent to the death. But the guide is the value at the time of the death, when the interests were acquired."

The provisions of ch. 44, Laws of 1903, in words are expressive of the intent that the tax shall be imposed at the time of the death of the transferor, in the manner and under the conditions prescribed, upon the interests transferred by him. Sec. 1 specifically contemplates that the tax shall be imposed on the transfer of a decedent's property under a will,

intestate law, or upon a grant or gift made in contemplation of death, and subd. 4 of this section declares that the tax shall be imposed when persons or corporations become beneficially entitled in possession or expectancy to the property or the income thereof. By subd. 6 it is enacted that the tax at the prescribed rates shall be upon the clear market value of the property transferred, exclusive of the exemption. The context of the law expresses as its purpose and object that the tax shall be imposed on the transfer at the time of the death of the decedent and rest as a lien on the property so transferred until paid.

The question as to when the tax so imposed becomes due and payable is presented under various claims and upon different considerations. Sec. 5 declares: "All taxes imposed by this act shall be due and payable at the time of the transfer," except as otherwise provided. It is also provided that in cases where the fair market value of estates, property, or interests therein are limited, conditioned, dependent, or determinable upon the happening of any contingency or future event and cannot by reason thereof be ascertained at the time of transfer, the tax shall become due and payable when the beneficiary shall come into the actual possession and enjoyment thereof. This portion of the law does not operate to postpone the imposition of the tax on the transfer beyond the time of the death of the transferor, for, as we have seen, the tax comes into existence at the time of the death of the decedent and remains a lien on the property involved until paid; but, since the fair market value thereof is not then ascertainable, it operates to postpone payment to the time when it is ascertainable, namely, when the contingency happens which gives the beneficiary the actual possession or enjoyment of the property transferred. Aside from this exception, all taxes are due and payable at the time of the transfer and then accrue. An examination of the provisions of the law fixing the time when the tax is declared due and payable and when it

accrues shows that these terms were used as equivalent, and that it was intended to prescribe that the tax accrues at the time of transfer, excepting as to those estates which are so limited, conditioned, dependent, or determinable upon future contingencies that their value cannot be ascertained. As to them the tax becomes due and payable and accrues at the time of the actual possession or enjoyment. In this case, then, the tax, at the moment of the death of Frederick Pabst, was imposed by operation of law on the taxable transfers and became a lien on the property so transferred, and the lien persists until the taxes shall be paid.

The provision made for a discount if the tax be paid within one year from its accruing, the charging of interest on payments deferred beyond eighteen months from the date when the tax accrues, and the proceedings to be taken to appraise the property after the transfer are attacked as discriminatory and impossible of performance in the usual course of the administration of a decedent's property. It is provided that any interested party may apply for an appraisal, which shall be made "immediately upon the transfer or as soon thereafter as practicable." Ample provision is therefore made for parties to complete an appraisal and to have the assessment and determination of the amount of the tax fixed within the time allowed for payment and thus avoid the penalties prescribed.

We find no merit in the claim that the law imposes a tax on transfers limited to vest on contingencies which may never happen, to persons not in being or ascertainable, or on transfers of defeasible estates which may never go to the parties who are taxed. True, the tax is imposed on every transfer defined by sec. 24 of the act, namely, "the passing of property or any interest therein, in possession or enjoyment, present or future, by inheritance, descent, devise, succession, bequest, grant, deed, bargain, sale, gift or appointment in the manner herein prescribed." As above stated, the tax is imposed at

the time of the devolution of the property, which is at the time of the transferor's death; but the law does not operate to enforce assessment and payment of the tax on interests or estates not vested or on those whose value cannot be ascertained by reason of the uncertainties of contingencies. Payment of the tax on such transfers is expressly postponed until the beneficiary comes into the actual possession or enjoyment thereof. The claim that the present owners of defeasible estates are compelled to pay the tax on the whole transfer, and that this operates to unjustly tax them, is not well founded, because provision for reimbursing them is made should it happen that such estates and interests should "be abridged, defeated or diminished." Subd. 3, sec. 13. Nor is such payment in the nature of an advancement by the first beneficiary. Of course the tax does not accrue unless the party becomes beneficially entitled in possession or expectancy to the property or the income thereof under the transfer. When the transfer confers the benefit of the estate, property, or income, then the beneficiary pays for what he is enjoying until the happening of a contingency deprives him thereof. In such event restitution is made out of the corpus of the estate or property. This operates to impose the tax only on the interest so actually received and enjoyed, and when an estate is terminated the tax is imposed on the party then receiving the property. Subd. 3 of sec. 13 makes provision for such a refund of overpayments to be enforced in the manner provided in sec. 8 of the act.

It is contended that the court erred in holding that the children of the decedent became beneficially entitled in possession or expectancy to any property or the income thereof under the will and the deed of gift of which the fair market value could be ascertained at the time of the death of the testator and donor. The claim that the widow's option to take one-sixth of the decedent's entire estate in lieu of the $50,000 per annum to be paid to her during her life out of the income of

the estate postponed the time of the accruing of the tax cannot be acceded to. It in no way affected the transfers actually made to the children under the will and the deed of gift. Under the conditions of the transfer the children became beneficially entitled to the property and the income thereof, subject to the annual payments to the widow for her life and the cost of Elspeth's education and maintenance during the widow's life until Elspeth's twenty-first year. There is nothing in these conditions which postpones their right to the property or the income thereof from the time of the decedent's death. Nor is their right thereto limited, conditioned, dependent, or determinable by a contingency, by reason of which the fair market value of their interests could not then be ascertained. The law provides a means of calculating the value of the interest of the widow and of Elspeth, and hence the fair market value of the remainder of the estate and the other interests was ascertainable.

It is further urged that *Emma Soehnlein's* interest and estate in the property transferred are not ascertainable in view of the conditions attached to the transfer. We do not so regard them. It is provided that if she should have no issue of the age of ten years living at the time of the widow's death, then the interest and estate transferred to her should remain in trust, and only the income thereof should be paid to her until she should have a child of the age of ten years. If no child of hers shall attain this age, then she is to receive during life only the income of the share of the estate set aside for her, and the body of this share is to go to her children surviving her or to the issue of any deceased child or children. If no child or the issue of any deceased child or children survives her, then her share is to go to the other heirs of the testator in equal parts. We have then a transfer in trust for her benefit, upon the condition that she shall receive only the income thereof during her life, unless she shall have a child which shall attain the age of ten years. The conditions of

this transfer are governed by the provisions of subd. 5 of sec. 13, because her rights, interest, and estate in the property so transferred in trust are dependent upon contingencies or conditions which may extend and change her interest and estate from a life estate to one in fee in the property so transferred to her. The act [Laws of 1903, ch. 44, sec. 13, subd. 5, as amended by Laws of 1903, ch. 249, sec. 2] provides that such a transfer shall be taxed at the lowest possible rate under the conditions on which it passes at the time of transfer, and that the tax shall be due and payable forthwith out of the property so transferred. In this case the rate imposed on this share, under the conditions existing at the time of decedent's death, was the same as the rate which would be imposed on this share if her brothers and sisters should eventually become entitled thereto under the conditions of the will and deed, being the rate prescribed for lineal issue by subd. 1, sec. 2. It therefore follows that the trial court imposed the proper tax on the transfer to *Emma Soehnlein,* that it accrued at decedent's death, and was payable as that of the other children. In the event that she shall enjoy no more than a life interest, she will be entitled to be reimbursed, in the manner above indicated, out of the corpus of the share so transferred to her.

It is contended that the court erred in holding that the deed of gift was a transfer in contemplation of death by the donor. The statute imposes a tax upon the transfer of property by deed or gift, "made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death." Subd. 3, sec. 1. The meaning of the words "in contemplation of death," as used in the statute, must be inferred and ascertained from the context of the act and the object sought to be accomplished by the law. It is manifest that they were intended to cover transfers of parties who were prompted to make them by reason of the expectation of death, and which, in view of that event, accomplish transfers of the property of decedents in the

nature of a testamentary disposition. It is therefore obvious that they are not used as referring to that expectation of death generally entertained by every person. The words are evidently intended to refer to an expectation of death which arises from such a bodily or mental condition as prompts persons to dispose of their property and bestow it on those whom they regard as entitled to their bounty. This accords with the general objects and purposes of the law, namely, the imposition of a tax on the devolution of property involved in the demise of the owner. The supreme court of Illinois in *Rosenthal v. People,* 211 Ill. 306, 309, 71 N. E. 1123, interpreted these words in such a tax law as follows:

"A gift is made in contemplation of an event when it is made in expectation of that event and having it in view, and a gift made when the donor is looking forward to his death as impending, and in view of that event, is within the language of the statute."

The claim that the words can include only gifts *causa mortis* attributes to them too restricted a meaning. A transfer valid as a gift *inter vivos,* if made under circumstances which impress it with the distinguishing characteristics of being prompted by an apprehension of impending death, occasioned by a bodily or mental state which has a basis for the apprehension that death is imminent, would be a transfer made in contemplation of death within the meaning of the law.

In the case of *Estate of Merrifield v. People,* 212 Ill. 400, 405, 72 N. E. 447, in speaking on this subject, the court says:

"It is said, however, by appellants that a transfer of property made without consideration, in contemplation of death, is a gift *causa mortis,* and that the stipulation is that the gift was absolute. Hence it could not be a gift *causa mortis,* as a gift *causa mortis* is conditioned upon the death of the donor. A gift *causa mortis,* strictly speaking, applies only to personal property, and the gift is defeated if the donor recovers. In this case the subject matter of the transfers was both real and personal property and the transfers were absolute, and not

upon the condition that they should be revocable in case of the recovery of the donor. They were, however, made in contemplation of his death. They fall, therefore, more nearly within the description gifts *inter vivos* made in contemplation of death than within the designation gifts *causa mortis.*" *In re Estate of Benton,* 234 Ill. 366, 84 N. E. 1026.

Though there is some divergence of view in the earlier cases in New York in their interpretation of these words, the view expressed in the Illinois cases was adopted in the recent decision of *Matter of Palmer,* 117 App. Div. 360, 102 N. Y. Supp. 236, as the proper one under the law as it then stood, which is substantially the same as the law of this state.

The statute was not intended to restrict persons in their right to transfer property in all legitimate ways, but it clearly manifests a purpose to tax all transfers which are accomplished by will, the intestate laws, and those made prior to death which can be classed as similar in nature and effect, because they accomplish a transfer of property under circumstances which impress on it the characteristics of a devolution made at the time of the donor's death. It is strenuously contended that the trial court's finding of fact that the deceased's execution of the deed of trust, transferring the brewing company's stock to his four children, was made in contemplation of death within this law, is not sustained by the evidence. The evidence on this issue is voluminous and so far as necessary has been incorporated in the statement of the case.

It is urged that the trial court was misled in its conclusion of fact on this issue through the error of receiving the death certificate in evidence. The claim is that the statute prohibiting decedent's attending physician from testifying to any fact concerning decedent's condition of which he had acquired knowledge in his professional capacity, and which it was necessary for him as a physician to know in order to properly prescribe for him, is a ground for the exclusion of the certificate as evidence. We discover no force in this

claim. Physicians are required by secs. 1024 and 1024*a*, Stats. (1898), to make the death certificate. This is made a public record. Its contents are published to the world and are no longer treated as privileged. Was the certificate properly received as evidence of its contents? Sec. 4160, Stats. (1898), provides that when the records specified in the section are produced by the proper custodian and are supported by the oath of the person in lawful charge thereof that the record is what it purports to be and is genuine, it "may be admitted as *prima facie* evidence" of its material contents. The amendment of 1898 to the section contemplates that the records of a physician, which are included in the section, should be received as evidence. We are of opinion that the death certificate is included in this section and was properly admitted as *prima facie* evidence of the material facts stated therein. In the case of *Rohloff v. Aid Asso.* 130 Wis. 61, 109 N. W. 989, a ruling excluding as original evidence a certificate of death made by a health officer was upheld. This ruling was evidently upon the ground that the amendment does not include the records of health officers.

The evidentiary facts relied on to show decedent's physical condition at the time of making the deed of gift and the will are in many respects uncontroverted. It is without dispute that he had had diabetes for many years, that he was fully informed of the state of his health during the period of his affliction, that he made a number of trips to parts of this and to foreign countries to build up his health, and that he received constant treatment from his physician to retard the progress of the disease. In the early part of the year 1903 his strength and health had become so impaired that his physicians advised him to pass the winter and the ensuing spring season in California. While upon this trip he had serious attacks of illness, one of which seriously imperiled his life. After his return to Milwaukee and during the early summer of 1903 he was under constant treatment, but showed signs of

declining vitality to such a degree that consultations of physicians were held concerning his condition. No evidence indicative of improvement was then discovered, and complications became manifest during the summer and autumn of 1903. True, there is conflict in the evidence of the experts called into the case and in the evidence of his physicians, the members of his family, and of others who observed him throughout his illness; but an attentive reading and examination of the evidence persuades us that the decedent, by reason of his apprehension of impending death, was led to make the deed of gift to transfer part of his estate to those whom he desired should have and enjoy it after his death.

Much stress is laid on decedent's declaration in the year 1900, while he was abroad for recuperation and rest, that in recognition of the valuable aid of his sons in building up his estate he intended, upon his return home, to dispose of part of his estate to his children. It is significant that he did not then do so or in the immediately succeeding years. He took no such steps until he had undergone the serious illness of 1903, which naturally admonished him of his rapid decline in strength and health. Considering his condition, the execution of the deed of gift and the will simultaneously indicates that he was disposing of his property to those whom he regarded as the natural objects of his bounty, rather than that he was transferring it to them as compensation for worthy and valuable services rendered by them in its accumulation. He knew his condition and was aware of the outcome to be inferred from his symptoms. After his return to Milwaukee he conferred with his attorneys and made the deed of gift and his will. These instruments were made and executed at the same time as one transaction. The evidence, in our opinion, abundantly sustains the trial court's conclusion that the deed of gift was made in contemplation of death.

The court's finding as to the value of the stock in the brewing company is excepted to as erroneous. The court found

the value of the brewing company's stock on January 1, 1904, the date of the decedent's death, to be $1,150 per share. The appraisers appointed by the county court reported the same value in January, 1905. The county court upon the trial valued it at $1,408.45 per share on January 1, 1904. The face value is $1,000 per share. The law requires that the tax shall be assessed on the clear market value of the property. It appears that there had been no general sales of this stock in the market. On the various occasions when he secured stock for the corporation or when there were dealings between members of the family, the decedent had dealt with this stock on the basis of its book value. The transfers shown were apparently made in reliance on the book value. The evidence adduced showed the dividends declared and paid for the years from 1896 to 1904, inclusive, and the value of the corporation's assets from 1896 to 1906, inclusive, exclusive of the good will of the business. In the deed of gift decedent declared the book value of 2,840 shares of stock to be $4,000,000. These items of evidence were offered as the best proof attainable to show the value of the stock. They were evidences of value, though they were not direct and general tests of market value. Many and various reasons are assigned why the evidence adduced on stock value fails to sustain the court's finding as to the value of the stock. These contentions are based on the claims that the dividends have been small, that the brewing plant has no convenient shipping facilities, that the stock transfers and the value of the corporation's assets, as carried on the books, are not reliable criteria, because they represent no more than the decedent's estimate of his business, and because there are no proper and necessary deductions for depreciation, losses, decrease in business, and other causes incident to the conduct and operation of so large and extensive an enterprise and its holdings. Special probative force is claimed for the opinion evidence of values adduced by appellants as tending to show that the

stock is worth less than its face value. After giving full effect to these considerations, we cannot say that the court erred by overestimating the actual value of the stock. The facts and circumstances regarding the business of the corporation and its properties, the progress, growth, and general financial results, furnish a basis for valuation. These evidences of the value of the stock are sufficient to sustain the conclusion of the trial court, and the findings of facts on this branch of the case must stand.

The court imposed a penalty of ten per cent. per annum from January 1, 1904, to March 1, 1907, upon the amount of tax found due from the appellants. Sec. 6 of the act provides:

"If such tax is not paid within eighteen months from the accruing thereof, interest shall be charged and collected thereon at the rate of ten per centum per annum from the time the tax accrued; unless by reason of claims made upon the estate, necessary litigation or other unavoidable cause of delay, such tax shall not be determined and paid as herein provided, in which case interest at the rate of six per centum per annum shall be charged upon such tax from the accrual thereof until the cause of such delay is removed, after which ten per centum shall be charged."

The question arises: Do the facts and circumstances of this case show that, by reason of "necessary litigation or other unavoidable delay," the tax cannot be deemed to have been determined and to have accrued? The record discloses that on December 31, 1904, the executors and trustees paid $58,714.72 to the state as the tax due on the transfer of property under the will, subject to the right to recover the same if the law should be declared invalid. This payment included no tax on the transfer made by the deed of gift and omitted items of property. The omitted items were added by way of a supplemental inventory, by agreement of all the parties to this litigation, and thereafter additional amounts, as finally determined and assessed, were paid to apply in dis-

charge of the tax upon the transfer by which the decedent's property passed to his heirs. In view of the nature and conditions of the transfer and the consequent difficulty of ascertaining the value of the property, the estates, and the interests transferred, the devolution of decedent's property obviously presented to the executors, trustees, and his heirs doubtful and perplexing questions as to their liability for the transfer tax and the amount thereof. It is clear from an examination of the case that uncertainty existed as to when the tax was due and payable and when it accrued, as to whether or not the transfer by the deed of gift was subject to taxation, as to the amount of stock included in the provision for Elspeth, as to the value of the stock of the brewing company, and as to other matters which will finally be determined by this litigation. We have no doubt that the situation and condition of affairs accounts for the delays by the executors, trustees, and the heirs of the decedent in beginning the administration and settlement of the estate and in paying the full amount of the transfer tax, and that they did not intend to defraud the state of any part of the tax justly due. We are also of opinion that this litigation is necessary within the contemplation of the inheritance tax law to determine upon the tax, and that the uncertainties incident thereto necessarily occasioned unavoidable delays in the ascertainment and assessment of the tax. Upon these considerations the penalty of ten per cent. per annum should not have been imposed upon the appellants on the amounts found due from them from January 1, 1904, to March 1, 1907. Under the provisions of sec. 6 of the act, the tax on the transfer under the deed of gift and the will accrued at the time of the decedent's death, but the interest charge of ten per cent. per annum had not become due under the facts and circumstances shown in this case.

The result of these considerations is that the trial court's findings and conclusions are approved in all matters except as to the imposition of the ten per cent. interest charge on the amounts found due from the appellants. The error com-

mitted in rendering a judgment including such interest requires reversal of the judgment. The cause must be remanded to the trial court for judgment on the findings as approved by this court. All the findings of the circuit court are approved on this appeal except the one finding ten per cent. interest due from January 1, 1904, to March 1, 1907.

By the Court.—Judgment reversed, and the cause remanded to the trial court for judgment on the findings as made by the trial court and approved by this court in accordance with this opinion.

TIMLIN, J., dissents.

BUCHER, Respondent, vs. WISCONSIN CENTRAL RAILWAY COMPANY, Appellant.

February 18—June 3, 1909.

Railroads: Master and servant: Injuries to brakeman: Contributory negligence: Assumption of risk: Questions for jury: Failure to submit: Trial: Special verdict: Failure to request submission of questions: Appeal and error: Assignments of error: Witnesses: Competency: Experts: Osteopaths: Verdict based on opinion evidence: Conclusiveness: Damages based on sexual impotence: Duty of court: Effect of expert testimony as to personal injuries: Weight and sufficiency of expert evidence: Excessive damages.

1. Where the evidence is conflicting the question of contributory negligence is for the jury.
2. In a personal injury case submission as part of the special verdict of a question concerning the contributory negligence of plaintiff, together with an instruction: "If you find that the plaintiff knew or had reasonable means of knowing the danger of coming in contact with" the obstruction causing his injury, the jury should answer the question "yes," sufficiently covers the question of assumption of risk.
3. Where there is no request to submit a question as part of the special verdict, but merely an exception taken to the verdict because it fails to contain such question, error cannot be assigned thereon.

4. Where an examination goes far enough to qualify osteopaths as medical experts for some general purposes relevant to the cause on trial and covering to a considerable extent questions objected to, error cannot be assigned because plaintiff did not show the witnesses had any knowledge from actual experience in similar cases, in the absence of cross-examination to bring out such facts.
5. While the verdict of a jury founded upon facts is entitled to great weight and is almost conclusive in the supreme court if supported by any evidence, yet a verdict founded only upon the opinion of experts concerning the cause of a condition, which condition is itself established by the opinion of experts, has not such weight.
6. Opinions of medical men may be rejected as an insufficient basis for a finding of fact by a jury where the court is convinced that reasonable certainty is outside of the possibilities of the situation.
7. Obvious error of opinion based on insufficient data may be disregarded by the supreme court as a basis for supporting a verdict.
8. Damages based on sexual impotence and the evidence to support such damages will be closely scrutinized by the supreme court and limited within proper bounds.
9. A verdict for damages, based on sexual impotence resting on opinion evidence which does not commend itself to the supreme court as reasonable or sound, will not be given the weight to which a verdict is entitled where it rests upon facts.
10. It is improper for a medical expert who did not see the patient until five months after an alleged injury to the head, and who had no certain or satisfactory data upon which to base an opinion of sexual impotence as the result of the injury, to testify as to the possible consequences of impotence: "It may go on for years, and might possibly terminate in something more serious."
11. In an action for personal injuries, testimony of medical experts that such conditions as they observed might have produced the injury alleged merely affirms that the injury was in their opinion sufficient to have produced the condition complained of, not that it did produce it.
12. Where the general unreliability of expert testimony is accentuated by a showing that the expert has little or no data upon which to base an opinion, that the subject upon which he expresses an opinion is one of great doubt and difficulty, and he demonstrates his lack of knowledge by his testimony, his opinion is insufficient to support a verdict seemingly unjust or excessive.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Walter D. Corrigan, Wm. A. Hayes,* and *Clifton Williams,* and oral argument by *Mr. Hayes.*

For the respondent there was a brief by *Bouck & Hilton* and *John F. Kluwin,* and oral argument by *Mr. Kluwin.*

The following opinion was filed March 30, 1909:

TIMLIN, J. The negligence charged against the defendant consists in its maintaining alongside of its main track at or near the station called Lake Villa a standpipe or water plug in such proximity to the track as to be dangerous to employees of defendant in the ordinary discharge of their duties. The appellant, by motion for a directed verdict and otherwise, raised in the court below, and now presents to this court (1) that there was no evidence sufficient to go to the jury upon the question of defendant's negligence; (2) that the uncontroverted evidence affirmatively shows contributory negligence on the part of the plaintiff.

The evidence tends to show that the upright part of this pipe was twenty-two inches from the step on the side of the engine cab used for entrance to the cab, and that this was too near for safety. The question of defendant's negligence upon this ground was fairly for the jury. Upon the question of the contributory negligence of the plaintiff there is strong evidence on the part of defendant to show plaintiff guilty of such negligence. But the testimony of the plaintiff is, in substance, that in the regular discharge of his duty as head brakeman in the usual manner under the circumstances shown, and with the kind of train shown, he was standing on the steps leading into the engine cab, holding the hand rails, leaning outward and looking back toward the rear of the train where the conductor was, for the purpose of receiving from the conductor and transmitting to the engineer the signal to pull out, which had not yet been given, but was momentarily

expected. While in this position and when unaware of the proximity of the standpipe he was brought in contact with the standpipe by the moving train and knocked off the steps and injured. Printed rules confessedly brought to the notice of the plaintiff are offered in evidence, and contain general words of warning, and directions to employees to acquaint themselves with the risks of their business and the location and distance of objects near the track, including standpipes, but no specific standpipe or other object is designated, and the rules themselves are in their general import merely declaratory of the duties and responsibilities resting upon employees by law. Upon this showing the question of plaintiff's contributory negligence was for the jury.

Error is assigned because the court failed to submit in the special verdict the question of plaintiff's assumption of the risk. The court did, however, submit a question numbered 6 covering the contributory negligence of the plaintiff, and instructed the jury as follows:

"If you find that the plaintiff knew or had reasonable means of knowing the danger of coming in contact with the standpipe, you should answer the sixth question 'Yes.' "

This authorized the jury to affirm the contributory negligence of the plaintiff under the circumstances stated in the question above quoted, and covered the assumption of risk under the evidence presented in the case. There could be no assumption of risk unless the plaintiff "knew or had reasonable means of knowing the danger of coming in contact with the standpipe," and if he had this knowledge or reasonable means of knowledge there was an absolute direction to find him guilty of contributory negligence. This was sufficient. Besides this, there was no request that the court submit a question in the special verdict covering assumption of risk, but merely an exception taken to the verdict because it did not contain such a question. This assignment of error cannot prevail.

The plaintiff presented two expert witnesses, who testified that they were osteopaths, holding diplomas from an osteopathic school of medicine and licensed to practice osteopathy in this state by the board of medical examiners. They also testified that they were required to study and have knowledge of the anatomy of the human body, including the nervous system, and they were required to be learned generally in all branches studied and practiced by regular physicians, except the *materia medica*. It is objected that the plaintiff has not shown that they had any knowledge from actual experience in similar cases, and this would perhaps be a good objection were that fact affirmatively shown. But the defendant omitted the usual preliminary cross-examination with reference to their qualifications and omitted on the regular cross-examination to bring out this fact, and then moved to have their opinions stricken out on this ground. This objection was therefore not well taken. The plaintiff went far enough in the first place to qualify these osteopaths as experts for some general purposes relevant to the case and covering to a considerable extent the questions asked. *Bloch v. Am. Ins. Co.* 132 Wis. 150, 112 N. W. 45; *Kath v. Wis. Cent. R. Co.* 121 Wis. 503, 99 N. W. 217. This assignment of error cannot prevail.

Other errors assigned and argued in the brief of the appellant need not be noticed, because the judgment of the court below must be reversed for two reasons so allied that we shall consider them together.

One of these is that the damages are excessive and rest largely upon incompetent evidence, and the other is that opinion evidence bearing upon the question of damages sustained by the plaintiff was improperly admitted. A summary of facts bearing upon these questions may be given as follows: On September 26, 1906, the plaintiff was injured as stated, and on the same day he was examined by Dr. Pullen, a physician in the employment of the defendant, who then made a written memorandum of plaintiff's condition. There was a

contusion on the back part of the head and upon the right hip. The injury to the head was a small swelling of the scalp about as large as a walnut on the back of the head. The scalp was not cut. There was a contusion on the right shoulder and the lip was slightly lacerated, but not enough to break the skin or draw blood in either case. This was the extent of his visible injuries. He made no complaint about his ear, but he complained of pain in the left testicle, and this the doctor examined and found a small chronic varicocele. The evidence of the train crew with the plaintiff at the time of the injury also indicated that plaintiff's injuries were slight. The plaintiff testifies that he was in good health, of sound hearing and sight, and sexually potent prior to the injury, but not since the injury; that he has suffered pain and dizziness continually since the injury. According to plaintiff's own testimony he was in bed only about a week, and he went to work again in November for one Green, doing general horseshoeing at $2.50 per day, and worked at this until the middle of January, 1907, sometimes five days in a week and sometimes four and one-half days. He also worked irregularly after this at other work. In February or March, 1907, he called in Dr. Corbitt when he was suffering from an acute attack of the grippe, and in this condition Dr. Corbitt first saw him. Plaintiff was then complaining a good deal of pain in his head, was sleepless, and had a moderately high temperature. Dr. Corbitt called on him twice after that, and for about two or three months ensuing he called at the doctor's office frequently, and on these occasions complained about his head, eyes, and ears, of having a constant headache, numbness in his arms, and pains. The doctor made tests and was convinced that there was such numbness, and found him quite nervous, and advised rest. The doctor said:

"He complained also at that time of being impotent. He complained of his eyes and his ears. I examined his ear. I advised him to see a specialist on the eye and ear. I thought at that time possibly that the persistent headache might be due to some eye strain."

The doctor went on to relate that the plaintiff complained of tenderness on the upper and lower part of his spine and the doctor thought there was such tenderness. The nerve controlling the erection of the penis is contained in the *sacro plexis,* and it was tender about that region. The brain, spinal cord, and the perval nerves all take part in the phenomenon of the erection of the penis.

After an interval of three months or more, during which plaintiff was at his home and not having any medical attendance, and shortly before the trial, the doctor examined him again and found his condition practically the same, except that plaintiff had lost in flesh. Dr. Corbitt went on to explain the erectile action of the penis, the cause thereof, the outflow of blood which produces this action, and stated that he believed from an examination of the case and the injury that there is in the instant case sufficient injury to either the brain or the spinal cord to cause impotence. In his opinion this condition of impotency resulted from an injury by a blow on the back of the head caused by coming in contact with the standpipe while riding on the side of a train moving at fifteen miles per hour; the blow being sufficient to cause temporary unconsciousness, and the fall being sufficiently violent to prevent plaintiff from continuing his work and so that he had to be assisted to get on the train and had lain in bed thereafter for five days and was prevented from working for several weeks. The questions to the doctor in this regard were very faulty, but not objected to. Dr. Corbitt also gave as his opinion that the plaintiff was not at the time of the trial physically able to work, and that his pain, numbness, and dizziness are probably *pettimal,* the mildest form of epilepsy, which the doctor thought was the direct result of the injury, but it might possibly be due to the ear trouble from which plaintiff was suffering. The impotency is in his opinion probably permanent, and the effect of impotency on the "general system" of a man thirty-three years old is to make him a neurasthenic, which describes a condition of nerve ex-

haustion. This condition he describes as a "general lassitude, a great deal of nervousness, and in some cases it may go on until they are bedridden, and might possibly terminate in something more serious." Upon cross-examination he said he found the plaintiff suffering from a mild form of varicocele.

Dr. Brazeau, a specialist in diseases of the eye, nose, and throat, examined the plaintiff for the first time March 17, 1907, and found him then suffering from suppuration of the middle ear. The drum was perforated in the anterior and interior portion about the size of half a pea, the small bones were inflamed and adhered to one another, and plaintiff complained of headache and dizziness. This doctor was quite cautious and conservative and did not go to the length of the first witness, but finally said that if the standpipe had struck plaintiff right over the ear it could have caused the condition described in the middle ear, but gave no opinion to the effect that the actual injury received could cause the condition he observed, rather the contrary.

One of the osteopaths testified to the existence of a "bony lesion," which he described in this luminous language: "Why, it is any opposition between that bone and other bones in its vicinity otherwise than normal, in a position besides a normal position." He was then asked:

"*Q.* Assuming that the plaintiff in this case, whom you examined, on the 26th of September, 1906, while riding upon the side of a train going from ten to fifteen miles an hour, was struck a violent blow in the back of the head which knocked him to the ground, might that lesion that you found have resulted from such injury?"

Objection having been made and overruled, the witness answered, "Well, that lesion might result from such injury as you describe." An additional impairment of plaintiff's condition was described by this expert as follows:

"The very sensitive condition of the spine and the muscles along in the middorsal region I attributed to irritation to the

nerves that supplied them, where they merge and send a branch to the muscles of motion or sensation, and also with the sympathetic system. Those nerves that come back and supply those muscles, they were affected on account of that abnormal condition of the spine in the middorsal region. That would produce a painful condition, painful area, and it might also be due to a deeper seated condition in the spinal cord itself."

This, he says, would incapacitate plaintiff for work to a great extent and cause him pain. He found sensitiveness in the lumbar region; "the lumbar vertebræ being those from the hip bone up to the twelfth dorsal, which is the one which the twelfth rib is attached to, and in that area there are nerves which connect with the penis." He was then asked a similar question to that before quoted, and he answered similarly that this second set of "abnormal conditions" *might* have been so caused.

The second osteopath found upon an examination of the plaintiff, to quote his own words, "that the relationship on the left side between that articulation, between the occipitus or base of the head, is backward in relationship, with its proper position on the atlas on the left side." Against objection he was asked and answered that this condition might have been caused by an injury such as the plaintiff sustained at Lake Villa, describing it generally. He also thought the plaintiff was probably suffering partially from nervous exhaustion.

The jury returned a verdict for plaintiff, assessing his damages at $4,000. It will be observed that there was a period of apparent health and ability to work of about five months intervening between the injury at Lake Villa and the attack of the grippe, and that these expert opinions were given by men who first saw him after he was afflicted with the grippe. It will also be observed that, in addition to the testimony of the plaintiff that these disabilities began after his injury, the nervous exhaustion and sexual impotence and "bony lesion" or "abnormal condition" of the plaintiff are

connected with the injuries sustained by him on September 26, 1906, by the opinion of experts that these conditions were so caused or that they might have been so caused. It is further noticeable that the impotence of the plaintiff is put forward as a substantial ground of damages. The verdict of a jury founded upon facts is entitled to great weight, and is almost conclusive upon this court if supported by any evidence. But the verdict of a jury founded only upon the opinion of experts concerning the cause of a condition, which condition is itself established by the opinion of experts, has no such weight. As was said in *Baxter v. C. & N. W. R. Co.* 104 Wis. 307, 330, 80 N. W. 644, 652:

"Opinion evidence alone is not conclusive in any case. The jury must pass upon the probabilities, and unless the opinion relied on is within the scope of reason and common sense it should not be regarded at all." *Johnson v. G. N. R. Co.* (Minn.) 119 N. W. 1061.

With reference to the weight to be given to opinion evidence, it is noticeable that opinions concerning value may be rejected if the facts on which the opinion is predicated are not sufficient to justify an opinion. *Lynch v. Troxell,* 207 Pa. St. 162, 56 Atl. 413. So in regard to the opinion of a physician concerning the value of the services of a nurse (*Cameron M. & E. Co. v. Anderson,* 34 Tex. Civ. App. 229, 78 S. W. 971); the value of the use of a vessel (*The Conqueror,* 166 U. S. 110, 17 Sup. Ct. 510); the value of a mine (*Glasier v. Nichols,* 112 Fed. 877); the value of a trotting horse (*Chicago & N. W. R. Co. v. Calumet Stock Farm,* 96 Ill. App. 337; *S. C.* 194 Ill. 9, 61 N. E. 1095); the value of the personal property of a city (*Winter v. Montgomery,* 79 Ala. 481); or the value of a contract of partnership (*Reed v. McConnell,* 101 N. Y. 270, 4 N. E. 718). So, where a lay witness is permitted to state his opinion of the mental condition of one whose capacity is under investigation, he is required to give a statement of facts observed by him upon

which this opinion is founded, and the value or weight of his testimony will often turn on whether he has any basis of fact for his opinion. *Crawford v. Christian,* 102 Wis. 51, 78 N. W. 406; *Boorman v. Northwestern Mut. R. Asso.* 90 Wis. 144, 62 N. W. 924. In the last-mentioned class of cases it has been variously ruled either that the opinion is incompetent or the evidence of no probative value. Id. Opinions of medical men may be rejected as an insufficient basis for a finding of fact by a jury where the court is convinced that reasonable certainty is outside of the possibilities of the situation. *Spear v. Hiles,* 67 Wis. 361, 30 N. W. 511.

In an inquiry relative to testamentary capacity the opinions of physicians were held not conclusive in this court, notwithstanding they had the aid of the finding below and were corroborated by some facts, because contrary to common knowledge. *Will of Blakely,* 48 Wis. 294, 4 N. W. 337. Where the damages awarded plaintiff were large and rested in part on the opinion of a physician to the effect that the physical and mental defects he observed in a child nearly two years old were caused by imprisonment of the mother during pregnancy, the judgment was reversed by this court, Justice LYON saying:

"In view of the fact that it is common knowledge that there are numerous causes for physical, mental, or nervous deficiency in children; that healthy women do sometimes give birth to deficient children; that nervous or otherwise unhealthy women often bear healthy children; and that Dr. Robinson detected no defect in the plaintiff's child until it was nearly a year and a half old,—we think the authorized limits of expert testimony were greatly exceeded when he was allowed to give his opinion that the deficiency in the plaintiff's child was caused by the nervous prostration of the plaintiff during her pregnancy." *Spear v. Hiles, supra.*

Where a verdict for damages rested in part upon opinion evidence of a physician "that plaintiff was liable—quite likely—to be bothered with the injury for several years and

might be always, at least under certain conditions, as overuse," the judgment was reversed and the testimony quoted described as conjectural. In the same case another physician testified that tuberculosis in the family of plaintiff's parents would show a strong susceptibility in all the family to tubercular infection, particularly in parts injured, and there would be great likelihood of such infection occurring or of plaintiff's becoming so infected. This was held to be merely conjectural. *Collins v. Janesville,* 99 Wis. 464, 75 N. W. 88. So that obvious error of opinion, opinion based on insufficient data, or nonsense clothed in words of "learned length," may be disregarded by this court as a basis for supporting a verdict. Here one of the physicians finds a man suffering from grippe and having a suppurated ear, and with some indications of varicocele and in a fever, five months after the man collided with the standpipe as described. The physician is of the opinion that the sexual impotence is not due to the grippe nor to the fever nor to the suppurated ear nor to the varicocele, but to the blow on the back of the head and the fall received five months before, the severity of which is a matter of proof unknown to the physician except by remote inference from the statement that the train was going ten or fifteen miles an hour and the plaintiff was rendered temporarily unconscious, and ill as stated in the question. If the severity of the blow is inferred from the headache, numbness, pains, and impotence, and the latter disabilities are inferred from the severity of the blow, the absurdity of the reasoning is apparent. If the severity of the blow is inferred from the position of the plaintiff at the time and the speed of the train as given, the opinion is based upon mere conjecture because given without reference to the description or to the extent of the injuries or wounds actually inflicted. Dr. Corbitt did not see these injuries or wounds. There is no evidence that they were described to him. They were not included in the question put to him. He did not consider that the plaintiff

had at the time, as testified by Dr. Pullen, chronic varicocele. Dr. Allen McLane Hamilton, in his work entitled "Legal Medicine," expresses the opinion that varicocele except in its earlier stages finally results in the production of both impotence and sterility. Vol. 2, p. 504. The witness wholly ignored the disease or sickness called grippe. See, also, Ogston, Medical Jurisprudence, 81, 82.

It is very easy to exaggerate before a jury the cause, effect, or probable permanency of such a condition as impotence. The same is true with regard to nervous disorders. Both are easy to feign, hard to disprove, exaggerated by auto-suggestion, and it is comparatively easy for an expert to have an opinion tracing either to a particular physical injury instead of to a disease, a mental condition, or a general impairment of health. If loss of sexual power is to be thrown into the scale as an item for which the plaintiff is entitled to be compensated in a personal injury case, common sense informs us that in practically all cases of severe injury, pain, suffering, or sickness there must be and ordinarily is during such period of stress a suspension of the sexual functions. This is also true of the lower animals. The consequence of considering this as an additional or independent item of damages must be that every sick or injured man may assert his sexual impotence as a ground for recovery additional to pain, sickness, or suffering, and thus duplicate damages. Cases may no doubt occur of direct injury to the generative organs in which some such ground of damages would not be a matter of mere conjecture, and what is here said has no reference to such cases. But if one in consequence of an injury is continually suffering pain and sickness, he is not apt to be concerned about his sexual powers or pleasures. If so, pain must have lost its usual distracting effects, and affliction its usual chastening consequences. In the instant case, if the plaintiff was sick and disabled to the extent he claims, he would in all probability be more concerned about his pain and sickness than about

his sexual potency when he consulted Dr. Corbitt, and there is a strong element of improbability in the claim that one really seriously ill and suffering pain, consulting a physician for relief, would also bring up the matter of his sexual impotence while in this distressful condition as an item of injury, instead of regarding it as a consequence of his pain and sickness, if he noticed it at all. Damages based upon any such ground and the evidence to support such damages will be closely scrutinized by this court and limited within proper bounds, and the verdict of a jury resting upon opinion evidence which does not commend itself to us as reasonable or sound will not be given the weight to which a verdict is entitled where it rests upon facts. We regard the recovery here as excessive upon the competent evidence. We are convinced that Dr. Corbitt had under the circumstances detailed, and five months after the injury, no certain or satisfactory data upon which to base his opinion that the impotency of the plaintiff, if it exists, was caused by the accident of September 26, 1906, or that it would be permanent. Neither was it proper for him to testify to the possible consequences of impotence in these words: "It may go on for years, and might possibly terminate in something more serious."

With reference to the testimony of the osteopaths, these gentlemen were put forward as expert witnesses; but they were not asked to give an opinion with reference to whether or not the peculiar conditions described by them were caused by the injury sustained on September 26, 1906. The question asked was, might such conditions as they observed have been so produced, and they answered that they *might*. Such testimony, if otherwise unobjectionable, is competent in corroboration of other evidence that the injuries were so produced. *Werner v. C. & N. W. R. Co.* 105 Wis. 300, 81 N. W. 416, and cases cited in opinion; *Conrad v. Ellington,* 104 Wis. 367, 80 N. W. 456. But this class of expert testimony merely affirms that the injury in question was in the opinion

of the witness sufficient to have produced the condition complained of, not that it did produce this condition. *Lyon v. Grand Rapids,* 121 Wis. 609, 99 N. W. 311, and cases cited in opinion. It is very remote, and its use generally is to refute a claim by the opposite party that the condition complained of could not have been so caused. In some courts it is ruled out as incompetent. *Briggs v. N. Y. C. & H. R. R. Co.* 177 N. Y. 59, 69 N. E. 223; *Galveston R. Co. v. Powers* (Tex.) 105 S. W. 491, and cases cited.

It cannot be put forward as an expression of opinion that the condition of the plaintiff was caused by the injury of September 26, 1906. The conditions described by the osteopaths are not those testified to by Dr. Corbitt, but quite different. There is no evidence that the disabilities described by the osteopaths in the excerpts above quoted, or rather the abnormal conditions which they claim to have found, were caused by the injury in question, but their unintelligent testimony was put forward as if there was such evidence. For illustration, the following was testified to against objection:

"As I said, we found the atlas region first, the head itself and the atlas region, a very much contracted condition of the neck, and those contractures in themselves might tend to pressure on the nerves or artery or blood vessels in that vicinity. Then, going on further to the dorsal region, the part of the spine to which the ribs are attached, we found a very much impacted condition; that is, there was not the mobility that there is in a normal spine. The spine was abnormal in that region. Contractions existed there in a very sensitive area."

Much of the evidence of these osteopaths is practically meaningless, mere nonsense, and was no doubt prejudicial to the defendant. The testimony of experts is proverbially unreliable at best, even when the experts are learned and competent, because bias is almost unavoidable on account of our mode of selecting experts, and bias requires small basis upon which to ground an opinion. But where this unreliability is accentuated by a showing that the expert has little or no

data upon which to base the opinion (*Strong v. Stevens Point*, 62 Wis. 255, 22 N. W. 425), and the subject upon which he expresses an opinion is one recognized by the approved learning of the times to be of great doubt and difficulty, or where the alleged expert demonstrates his lack of knowledge by his testimony, such testimony will not be sufficient to support a verdict which to this court seems unjust or excessive. *Baxter v. C. & N. W. R. Co.* 104 Wis. 307, 80 N. W. 644.

By the Court.—The judgment of the circuit court is reversed and the cause remanded for a new trial.

WINSLOW, C. J., took no part.

A motion for a rehearing was denied June 3, 1909.

SCHIEFELBEIN, Appellant, vs. FIDELITY & CASUALTY COMPANY OF NEW YORK, Respondent.

March 9—June 3, 1909.

Appeal and error: Review: Sufficiency of evidence: Release: Impeachment.

1. On an issue as to whether or not the plaintiff was induced by fraud to execute a release of damages, the decision of the trial court must prevail unless it appears from the record to be clearly wrong.
2. To impeach a formal written release on the ground of fraud or mistake the proof must be clear and convincing beyond reasonable controversy.

APPEAL from a judgment of the circuit court for Wood county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

Action to recover damages claimed to have been caused by deceit.

The claim of the plaintiff was this: On and for some time prior to January 18, 1905, plaintiff was an employee of the Nekoosa Paper Company as a laborer in its mill. On such day, while engaged in his employment loading logs on flat cars by means of a steam log carrier, a cable, which was a necessary part of the appliance, broke, causing a derrick boom to drop upon his head, severely injuring him to his great damage. The cable, to the knowledge or reasonable means of knowledge of the company, was defective, unsafe, and dangerous at the time of the accident. By reason of the facts the company became liable to plaintiff to compensate him for his injuries. At such time the company held a policy of casualty insurance in the defendant company as to liability to its servants from injuries received in the course of their employment. After the injury defendant's agent, by falsely and fraudulently misrepresenting to plaintiff, at a time when by reason of his infirmities he was unable to make investigation of the matters, the condition of the cable when it broke, and also by falsely and fraudulently misrepresenting to him the extent of his injuries and the consequences thereof, which he believed to be true, plaintiff thereby was induced, without negligence on his part, to accept the sum of $119 in full settlement for all claims for damages against his employer on account of his injuries and to execute a formal release accordingly. Such agent, at the time he so obtained such release, well knew plaintiff had a valid claim for damages to an amount many times the sum so accepted, and that such small sum was accepted in ignorance of the facts, which ignorance as indicated, without negligence on plaintiff's part, was produced by the said false and fraudulent representations. By reason of the facts plaintiff suffered damages in the sum of $20,000.

Defendant answered putting in issue all allegations of the complaint respecting the release having been obtained by fraud and alleging that it was signed and the settlement made

by plaintiff freely and voluntarily, with full knowledge of the facts.

At the close of the evidence, the court, on motion of counsel for defendant, directed the jury to render a verdict in its favor upon the ground that such evidence was insufficient to show, reasonably, any false representations as to matters of fact having been made to the plaintiff for the purpose of inducing, or which did induce, him to sign the release, and, therefore, that there was no case made for avoiding the release.

For the appellant there were briefs by *Cady, Strehlow & Jaseph,* and oral argument by *Max H. Strehlow.*

Byron B. Park, for the respondent.

The following opinion was filed March 30, 1909:

MARSHALL, J. The record presents the single question of whether there was evidence sufficient to carry the case to the jury on the issue respecting whether plaintiff was induced by fraud to sign the release. In reviewing such a question, upon appeal, it is elementary that the decision of the trial court must prevail unless it appears from the record to be clearly wrong.

The evidence has been carefully examined, resulting in our being unable to reach a conclusion that the trial court, plainly, committed error. It does not seem best to state such evidence in detail, showing by discussion thereof justification for such conclusion. Such discussion would add very little, if anything, to the force of the decision and would furnish very little, if any, assistance in the disposition of future cases, since no two can be reasonably expected to be alike as to facts. This case, in our judgment, was properly considered by the trial court as ruled in favor of defendant by *Steffen v. Supreme Assembly of Defenders,* 130 Wis. 485, 110 N. W. 401, and similar cases. It was there said, with reference to avoiding a settlement evidenced by a signed writing: "To accom-

plish impeachment of a formal written instrument on" the ground of fraud or mistake "the proof must be clear and convincing beyond reasonable controversy." Treating of a similar matter in *Kowalke v. Milwaukee E. R. & L. Co.* 103 Wis. 472, 480, 79 N. W. 762, 765, the court said:

"The question in each such case is, Did the minds of the parties meet upon the understanding of the payment and acceptance of something in full settlement of defendant's liability? If they did, without fraud or unfair conduct on either side, the contract must stand, although subsequent events may show that either party made a bad bargain, because of a wrong estimate of the damages which would accrue."

It was in the light of such adjudications as those specifically referred to and others of a similar character, that the trial court reached the conclusion that the fact, if it be a fact, of appellant's injuries proving more severe than was supposed at the time of the settlement, could have no bearing upon the efficiency of the release, and that no case was made warranting a finding that appellant was imposed upon by respondent.

By the Court.—The judgment is affirmed.

WINSLOW, C. J., took no part.

A motion for a rehearing was denied June 3, 1909.

SOUTHWESTERN SLATE COMPANY, Appellant, vs. STEPHENS, Respondent.

March 11—June 3, 1909.

Appeal and error: Findings, when disturbed: Foreign corporations: Wisconsin contracts: Offer to sell stock: Acceptance: Completed contract: Rights of subscribers: Void contracts: "Personal liability" of corporation: Commerce: Interstate commerce: Contracting and transacting business in Wisconsin: Amendment of statutes.

1. Where a foreign corporation had not complied with the requirements of sec. 1770*b*, Stats. (1898), as amended by ch. 506, Laws of 1905, findings of the trial court that its contract was made in Wisconsin and affected its personal liability, supported by sufficient evidence, must be affirmed, regardless of whether the corporation was or was not transacting business in this state within the meaning of subd. 2, sec. 1, of the amendment of 1905.
2. Contracts inhibited by subd. 10, sec. 1, ch. 506, Laws of 1905, are not limited to those made by a foreign corporation doing business in this state within the meaning of subd. 2 of that section.
3. An offer by a foreign corporation to sell its stock and sell it in Wisconsin, when accepted by a subscriber residing in Wisconsin, completes a contract, and such contract is made in Wisconsin, although it might be afterwards avoided by failure or refusal to perform conditions, which as a matter of fact were performed.
4. An organized corporation, as such, has the right to offer for sale its unsubscribed capital stock and to make a valid sale of the same.
5. Where an organized corporation offers to sell its capital stock at a stipulated figure, an acceptance of the offer makes a binding contract. An acceptance of the acceptance is unnecessary.
6. Subscribers to unsold capital stock of a corporation become members thereof, and the corporation becomes bound to deliver the muniments of title showing the interest the subscribers have acquired in the corporation, which may be compelled by appropriate proceedings in courts.
7. A subscriber for unsold capital stock of a corporation, by virtue of his contract of purchase, becomes entitled to enforce the ordinary rights of stockholders against the corporation.

8. A single contract falls within the ban of the statutes, when made by a foreign corporation which has failed to comply with the requirements of sec. 1770*b*, Stats. (1898), as amended by ch. 506, Laws of 1905.
9. A contract by a foreign corporation for the sale of its unsold capital stock to a subscriber affects the personal liability of the corporation within the calls of sec. 1770*b*, Stats. (1898), as amended by ch. 506, Laws of 1905, and is void.
10. A sale of shares of a corporation is really the sale of a fractional interest in the corporation, and where made by a foreign corporation to a resident of Wisconsin involves no question of interstate commerce.
11. Ch. 506, Laws of 1905, does not amend the law as it then existed so as to relieve all foreign corporations that do not have a portion of their capital stock invested in Wisconsin from complying with the statutes, if such corporations actually transact business within the state, or make contracts therein upon which they assume personal liability.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This action is brought to recover a balance alleged to be due on an unpaid subscription for capital stock of the plaintiff. The plaintiff was incorporated June 16, 1905, with an authorized capital stock of $500,000. Its principal place of business was Pierre, South Dakota, and outside of South Dakota its principal place of business was the city of Chicago. Its articles of incorporation empowered it to engage in a great many different kinds of business, among them the operation of mines and quarries and dealing in the capital stock and bonds of the plaintiff or any other corporation. The business in which the company was engaged, in so far as it was engaged in any business, was developing slate quarries in Arkansas. It never complied with the provisions of sec. 1770*b*, Stats. (1898). Prior to November, 1905, the company had issued $232,000 of paid-up stock. At a meeting of the board of directors held in Chicago in August, 1905, it was decided to sell a portion of the authorized and unissued stock of the company in order to provide the necessary work-

ing capital, and a resolution was passed authorizing the secretary to sell such stock at not less than par, and also authorizing him to offer a commission for the sale of the same not exceeding fifteen per cent. of the amount realized upon such sale. N. B. Van Slyke of Madison, Wisconsin, was president of the company, and J. M. Van Slyke was its secretary. An arrangement was entered into with one Frank M. Wootton, a broker of Madison, to sell the capital stock of the corporation to the amount of $100,000. There is some dispute in the testimony as to whether this contract was made on behalf of the company by J. M. Van Slyke or by N. B. Van Slyke. The court found that the contract was made with the latter. Mr. Wootton commenced soliciting subscriptions in December, 1905, and secured the necessary subscriptions prior to March 6, 1906. The subscribers were all residents of the state of Wisconsin. When the necessary amount of capital stock was subscribed the subscription paper was taken by Mr. Wootton to N. B. Van Slyke and the same was checked over by him. The defendant subscribed to the capital stock of the plaintiff to the amount of $5,000 and paid the first twenty per cent. assessment. Thereafter he refused to pay any other or further assessments, and this suit is brought to recover the unpaid balance of his subscription, amounting to $4,000. The court found that the plaintiff made a contract with Wootton for the sale of its stock on commission; that Wootton secured the subscription of the defendant, a resident of Madison, for $5,000 of its capital stock; that such subscription was made at Madison, Wisconsin, and the same was accepted there by N. B. Van Slyke as president of the corporation, pursuant to the authority given him by the board of directors. As a conclusion of law the court found that the subscription contract was void under the provisions of sec. 1770*b*, Stats. (1898). The trial court in his opinion held that the power to sell carried with it the authority to accept subscriptions, and that therefore the entire contract pertaining to the sale of the stock

was made in Wisconsin; that such contract imposed mutual obligations upon the contracting parties which affected the personal liability of the plaintiff corporation; and that the plaintiff was transacting business within the state in violation of the statute referred to. From a judgment dismissing the complaint in the action this appeal is taken.

For the appellant there was a brief by *Richmond, Jackman & Swansen,* attorneys, and *Josiah Cratty,* of counsel, and oral argument by *S. T. Swansen.* They contended, *inter alia,* that the court erred in finding that the defendant's subscription was accepted in Wisconsin. Delivery of the subscription and its acceptance were necessary. *Badger P. Co. v. Rose,* 95 Wis. 145; *Gilman v. Gross,* 97 Wis. 224; *Franey v. Warner,* 96 Wis. 222; 1 Cook, Corp. (6th ed.) §§ 72, 82–88; *White v. Crosby* (Tex.) 51 S. W. 350; *Northern C. M. R. Co. v. Eslow.* 40 Mich. 222, 223; 1 Machen, Modern Law of Corp. §§ 186, 221; *Wright v. Agelasto,* 104 Va. 159, 51 S. E. 191; *Porter v. Raymond,* 53 N. H. 519; *Johnson v. Schar,* 9 S. Dak. 536, 70 N. W. 838, 839; *Bobzin v. Gould B. V. Co.* (Iowa) 118 N. W. 40; *Cravens v. Eagle C. M. Co.* 120 Ind. 600, 21 N. E. 981, 983; *Co-operative T. Co. v. Katus,* 140 Mich. 367, 103 N. W. 814; *Chase v. S. & C. R. Co.* 38 Ill. 215; 7 Am. & Eng. Ency. of Law (2d ed.) 129. The conditional subscription being completed in Chicago makes it an Illinois contract. A contract is made where it first takes effect. 9 Cyc. 670; *Holder v. Aultman,* 169 U. S. 81, 45 L. Ed. 669, 672; *Milliken v. Pratt,* 125 Mass. 374; 2 Parsons, Cont. 712; *Perry v. Mount Hope I. Co.* 15 R. I. 380, 5 Atl. 632; *Shuenfeldt v. Junkermann,* 20 Fed. 357, 359; *Presbyterian M. Fund v. Thomas,* 126 Wis. 281, 282; *Emerson Co. v. Proctor,* 97 Me. 360, 54 Atl. 849. The court erred in its conclusions of law holding the subscription contract void under sec. 1770*b,* Stats. (1898), and amendments thereto, and in dismissing the complaint. Ch. 506, Laws of 1905, being a complete revision of the laws relating to foreign corporations, operates to repeal

all former statutes on the subject. *State v. Campbell,* 44 Wis. 529, 534; *Dane Co. v. Reindahl,* 104 Wis. 302. The plaintiff before doing the acts shown in the testimony was not required to obtain a license authorizing it to do business in this state. *Chicago T. & T. Co. v. Bashford,* 120 Wis. 281, 284; *Atlas E. Works v. Parkinson,* 161 Fed. 223; *Catlin & P. Co. v. Schuppert,* 130 Wis. 642; *International T. Co. v. Peterson,* 133 Wis. 302, 307. A subscription to capital stock is merely an offer by the subscriber to the company to take the amount of stock designated in the subscription. The subscriber is the offerer. 1 Machen, Modern Law of Corp. §§ 182, 619; *Da Ponte v. Breton,* 121 La. 454, 46 South. 571; 1 Cook, Corp. (6th ed.) § 61; *Wells v. G. B. & M. C. Co.* 90 Wis. 442, 453. Transacting or doing business within the meaning of sec. 1770*b*, Stats. (1898), means doing the business for which the corporation is organized. *Penn. C. Co. v. McKeever,* 183 N. Y. 98; *Comm. v. Standard Oil Co.* 101 Pa. St. 119, 148; *People ex rel. Parker Mills v. Comm'rs,* 23 N. Y. 242; *Cooper Mfg. Co. v. Ferguson,* 113 U. S. 727, 28 L. Ed. 1137; *Green v. C., B. & Q. R. Co.* 205 U. S. 530; *Boardman v. S. S. McClure Co.* 123 Fed. 614; *Beard v. Am. & U. & A. P. Co.* 71 Ala. 60. Sec. 1770*b* and like statutes are for the protection of third persons dealing with foreign corporations and are not intended as a regulation between the corporation and its own members or those negotiating to become such. *First Nat. Bank v. Leeper,* 121 Mo. App. 688, 97 S. W. 636; *Union T. Co. v. Sickels,* 126 App. Div. 920, 109 N. Y. Supp. 262; *Mandel v. Swan L. & C. Co.* 154 Ill. 177, 40 N. E. 462; *People ex rel. Stead v. C., I. & L. R. Co.* 223 Ill. 581, 79 N. E. 144, 146; *Payson v. Withers,* Fed. Cas. No. 10,864; *Honeyman v. Colorado F. & I. Co.* 123 Fed. 96, 97; *Galena M. & S. Co. v. Frazier,* 20 Pa. Super. Ct. 394, 397; *Pavilion Co. v. Hamilton,* 15 Pa. Super. Ct. 389, 391; *Brown v. Guarantee S. L. & I. Co.* 46 Tex. Civ. App. 295, 102 S. W. 138; *Davis & R. Bldg. & Mfg. Co. v.*

Dix, 64 Fed. 406; Beale, Foreign Corp. §§ 204–209. The transaction constituted an act of commercial intercourse, and hence, as between the parties residing in different states, was an act of interstate commerce. *Butler Bros. S. Co. v. U. S. R. Co.* 156 Fed. 1, 17; *Pensacola Tel. Co. v. W. U. Tel. Co.* 96 U. S. 1, 8; *Gibbons v. Ogden,* 9 Wheat. 1, 6 L. Ed. 23, 68; *Loverin & B. Co. v. Travis,* 135 Wis. 322, 115 N. W. 829, 831; *Passenger Cases,* 7 How. 283; 7 Cyc. 413, 414.

For the respondent there was a brief by *Olin & Butler,* and oral argument by *J. M. Olin.* They contended, *inter alia,* that there was no error in finding that defendant's subscription was accepted in Wisconsin. (a) The offer to sell treasury stock of the plaintiff was made by the company to the prospective buyers. *Greer v. Chartiers R. Co.* 96 Pa. St. 391, 42 Am. Rep. 548; *McDowell v. Lindsay,* 213 Pa. St. 591, 63 Atl. 730, 731; *Bates v. G. W. Tel. Co.* 134 Ill. 536, 25 N. E. 521; *European & N. A. R. Co. v. McLeod,* 16 N. B. 3. (b) The contract was accepted in Wisconsin. *Badger P. Co. v. Rose,* 95 Wis. 145, 152; *Eliason v. Henshaw,* 4 Wheat. 225; *M'Culloch v. Eagle Ins. Co.* 18 Mass. 278; 1 Morawetz, Corp. (2d ed.) § 48; 1 Cook, Corp. (6th ed.) § 72. (c) The condition that Mr. Higham should be employed is collateral and in the nature of a condition subsequent. *American Bldg. & L. Asso. v. Rainbolt,* 48 Neb. 434, 68 N. W. 493, 497, 498; 1 Cook, Corp. (6th ed.) § 78; *Bobzin v. Gould B. V. Co.* (Iowa) 118 N. W. 40; *Paducah & M. R. Co. v. Parks* (Tenn.) 8 S. W. 842, 844; *Morrow v. I. & S. Co.* 87 Tenn. 262, 10 S. W. 495, 500; *Mill Dam Foundery v. Hovey,* 21 Pick. 417, 437; *Pacific M. Co. v. Inman,* 46 Oreg. 352, 80 Pac. 424, 427; *Johnson v. Georgia M. & G. R. Co.* 81 Ga. 725, 8 S. E. 531; *Chamberlain v. Painesville & H. R. Co.* 15 Ohio St. 225; *Cravens v. Eagle C. M. Co.* 120 Ind. 6, 21 N. E. 981, 983; *Hoffman v. King,* 70 Wis. 372, 382; *Keller v. Johnson,* 11 Ind. 337, 71 Am. Dec. 355. No question of interstate commerce is involved in the case. *Cat-*

lin & P. Co. v. Schuppert, 130 Wis. 642; *Elwell v. Adder M. Co.* 136 Wis. 82, 116 N. W. 882, 884; 17 Am. & Eng. Ency. of Law (2d ed.) 75; *Adams Exp. Co. v. Comm.* 124 Ky. 160, 92 S. W. 932, 933; *Standard Oil Co. v. State* (Tenn.) 100 S. W. 705, 711; *State v. Scott,* 98 Tenn. 254, 39 S. W. 1; *Kidd v. Pearson,* 128 U. S. 1; *Plumley v. Massachusetts,* 155 U. S. 461; *Diamond G. Co. v. U. S. G. Co.* 187 U. S. 611, 616; *International T. Co. v. Peterson,* 133 Wis. 302, 308; *Paul v. Virginia,* 8 Wall. 168; *Hopper v. California,* 155 U. S. 648; *New York L. Ins. Co. v. Cravens,* 178 U. S. 389; *Northern S. Co. v. U. S.* 193 U. S. 197, 333, 390, 391; *Ware v. Mobile Co.* 209 U. S. 405, 411–413; *New York ex rel. Hatch v. Riordan,* 204 U. S. 152, 161, 162; *People ex rel. Hatch v. Riordan,* 184 N. Y. 431, 453. The subscription contract, when accepted, made the defendant a stockholder, whether he had paid his subscription or not. *Franey v. Warner,* 96 Wis. 222, 231; *Rehbein v. Rahr,* 109 Wis. 136, 147; *Smith v. Burns B. & Mfg. Co.* 132 Wis. 177, 191; *McComb v. Barcelona A. Asso.* 134 N. Y. 598, 10 N. Y. Supp. 546, 549. Hence the corporation became bound to recognize defendant as a stockholder, and he could have compelled the corporation to thus recognize him and to award to him his share of the profits of the corporation. *Morey v. Fish Bros. W. Co.* 108 Wis. 520, 527; *Bailey v. Champlain M. & P. Co.* 77 Wis. 453, 459. He could have compelled the delivery of the certificate had it been refused. *Pacific Nat. Bank v. Eaton,* 141 U. S. 227, 233; *Wells v. Green Bay & M. C. Co.* 90 Wis. 442, 453; *Selover v. Isle Harbor L. Co.* 91 Minn. 451, 98 N. W. 344, 346; 1 Cook, Corp. (6th ed.) sec. 61.

The following opinion was filed March 30, 1909:

BARNES, J. Sec. 1770*b*, Stats. (1898), as amended by ch. 506, Laws of 1905, was in force when the transactions out of which this action arose took place. The law forbade any

foreign corporation to "transact business or acquire, hold or dispose of property in this state until such corporation" complied with the law. It also provided that "every contract made by or on behalf of any such foreign corporation affecting the personal liability thereof or relating to property within this state," before it complied with the law, should be wholly void and unenforceable by the corporation, but might be enforced against it.

The defendant seeks to defeat this action on two grounds: (1) That plaintiff was transacting business in this state in violation of law; and (2) that the contract upon which the suit is brought was made in Wisconsin and affected the personal liability of the defendant and was therefore void. The trial court found as a matter of fact that the subscription contract was made in Wisconsin and that it affected the personal liability of the plaintiff. If there is sufficient evidence in the record to sustain this finding the judgment must be affirmed. This result must follow regardless of whether the plaintiff was or was not transacting business in this state within the meaning of subd. 2, sec. 1, of the 1905 law. We do not think the contracts inhibited by subd. 10 of sec. 1 of the act are limited to those made by a corporation doing business within the meaning of subd. 2. Such a construction would render the quoted portion of subd. 10 superfluous. The important question, therefore, becomes almost wholly one of fact and of legal inferences to be drawn therefrom.

In July of 1905 the secretary of the corporation was authorized to negotiate the sale of a portion of the unsubscribed stock of the company. In December Mr. Wootton was employed as a broker, by either the president or the secretary of the corporation, to make the sale. The court found that he was employed by the president. He was assisted in securing subscribers by Mr. N. B. Van Slyke, the president of the company, and by Mr. Higham, it being understood that the latter should be employed as manager of the company if

$100,000 of the capital stock were disposed of so as to insure the necessary working capital to finance the enterprise. Mr. Higham submitted his proposition to the board of directors of the corporation at Chicago at a meeting held on January 29, 1906. Mr. N. B. Van Slyke was authorized by the directors at such meeting to offer for sale, in accordance with a subscription form agreed upon, and to sell, a sufficient amount of the treasury stock of the company to insure the permanent financing of it. He was also authorized to enter into a contract with Higham whenever the subscription was completed as provided in the form of subscription proposed. Such subscription form contained two conditions, by one of which it was provided that not less than $100,000 should be subscribed, and by the other that Mr. Higham was to undertake the management of the business under a five-year contract. As we read the subscription contract, it would not be binding on the subscribers unless both conditions were fulfilled. N. B. Van Slyke, Higham, and Wootton all resided at Madison. All of the subscriptions were obtained in Wisconsin. The requisite amount was subscribed about March 1st. The subscriptions were apparently approved by Van Slyke. The stock issued was sent him and collections therefor were made through the bank in which he was interested. After the requisite subscriptions were obtained Mr. Van Slyke apparently exercised his authority to hire Higham. At a meeting of the directors held at Chicago March 16th a resolution was passed approving of the contract made by Mr. Van Slyke with Mr. Higham on March 6th. It appears that the formal contract with Higham was actually signed after the meeting of March 16th.

We think this testimony clearly shows an offer made by the plaintiff to sell its stock and to sell it in Wisconsin. When this offer was accepted by the subscribers and the requisite $100,000 was subscribed, a completed contract was made, and it was made in this state. It might be avoided by failure or

refusal to employ Higham, but as a matter of fact he was employed at Madison and the contract became complete in every particular. *Greer v. Chartiers R. Co.* 96 Pa. St. 391; *European & N. A. R. Co. v. McLeod,* 16 New Brunswick, 3; 10 Cyc. 384. The plaintiff was an organized corporation and as such had the right to offer its unsubscribed stock for sale and to make a valid sale of the same. *Blunt v. Walker,* 11 Wis. 334, 350. Having offered to sell its stock at a stipulated figure, no good reason is apparent why an acceptance of the offer would not make a binding contract, subject to repudiation by the purchaser if the manager stipulated for was not employed. The case before us is unlike *Badger P. Co. v. Rose,* 95 Wis. 145, 70 N. W. 302; *Smith v. Burns B. & Mfg. Co.* 132 Wis. 177, 111 N. W. 1123; and *Franey v. Warner,* 96 Wis. 222, 71 N. W. 81, where the corporations were not organized when the subscriptions were made; nor like *Rehbein v. Rahr,* 109 Wis. 136, 85 N. W. 315, where the statute required the subscriptions to be a part of the articles of organization as filed; nor like *Gilman v. Gross,* 97 Wis. 224, 72 N. W. 885, where the transaction between the corporation and the prospective stockholder took the form of an offer to purchase by the latter and there was no acceptance by the former. We know of no case in this court holding that where a corporation offers for sale its unsold stock and such offer is accepted, there must be an acceptance of the acceptance to make a binding contract. Moreover, if acceptance of the subscriptions by the corporation were necessary to make a binding contract, we think the evidence is sufficient to sustain the finding of the trial court that such acceptance was made in Wisconsin by the duly authorized officer of the corporation, Mr. Van Slyke.

The contract having been made in Wisconsin, the subscribers became members of the corporation, and the plaintiff was bound to deliver the muniments of title showing the interest they had acquired in the corporation, and, in the event of its

failure so to do, delivery might be compelled by appropriate proceedings in the courts. Furthermore, by virtue of such contract of purchase the subscribers became entitled to enforce the ordinary rights of stockholders against the corporation. 1 Cook, Corp. § 192, and cases cited. A single contract falls within the ban of the statute. *Allen v. Milwaukee,* 128 Wis. 678, 106 N. W. 1099. It follows, therefore, that the contract was not only made within the state, but that it affected the personal liability of the plaintiff and was void under our statute. What was really sold was a fractional interest in the corporation, and we do not think the transaction involved any question of interstate commerce. *International T. Co. v. Peterson,* 133 Wis. 302, 113 N. W. 730. Neither do we think that the act of 1905 was intended to amend the law as it existed so as to relieve all foreign corporations that did not have a portion of their capital invested in Wisconsin from complying with the act if such corporations actually transacted business within the state or made contracts therein upon which they assumed a personal liability.

By the Court.—Judgment affirmed.

WINSLOW, C. J., took no part.

A motion for a rehearing was denied June 3, 1909.

PFISTER, Respondent, vs. MILWAUKEE FREE PRESS COMPANY and another, imp., Appellants.

April 24—June 3, 1909.

Libel and slander: Pleading: Privilege: Mitigating circumstances: Newspapers: Private citizens: Fair criticism: Proper comment: Publication by other papers: Appeal and error: Harmless error: Justification: Innuendo: Different meanings: Meaning of the writer: Instructions to jury: Common knowledge: Notoriety: Mitigation of damages: Character of plaintiff: Exclusion of evidence: Acts of corporation: Managing editor of newspaper: Ratification: Exemplary damages: Admissibility of evidence: Malice: Collateral issues: Testimony taken before grand jury: Separate causes of action: General verdict, when proper: Necessity of exceptions: Failure to instruct jury: Necessity of requests for instructions: Excessive damages.

1. Where, in an action against a newspaper company for libel, the defendant in its answer claimed the right to discuss public graft and kindred questions, and asserted that in the exercise of such right, and not otherwise, it published the alleged libelous articles, it having specifically pleaded and designated such matters as a defense of privilege was bound by its pleading and was not authorized thereunder to offer proof of mitigating circumstances.
2. Affirmative proof of mitigating circumstances cannot be given in evidence without having been specially pleaded.
3. Where plaintiff had no office, was not a candidate for office, and did not belong to any class which by seeking and inviting public patronage renders itself amenable to public comment and criticism which cannot be rightly applied to a private citizen, a defense of "privilege" or "fair criticism and proper comment" is not permissible in an action for libel.
4. A false and defamatory publication concerning a private citizen is not privileged merely because it may relate to some public matter.
5. Although it seems that the defendant may show in mitigation of damages that a libelous article was copied from another newspaper and published under the belief that it was true, a plea that other articles of like tenor and effect were also published in other papers does not present that question, and it is not error to strike out such allegations of the answer.

6. Where defendant has pleaded the truth as justification for an alleged libel, it is not incumbent upon the plaintiff as part of his case to negative the truth of the charges, but if he sees fit to assume that burden the defendant is not prejudiced.
7. A ruling on evidence in an action for libel that the published articles did not directly charge plaintiff with having committed a crime, but were susceptible of such meaning, and that it was for the jury to say whether or not such was their true meaning, and further that it was not permissible to aver in the answer that plaintiff was guilty of an offense different from that referred to in the complaint and then allege, by innuendo, that the language used in the published article related to the offense set out in the answer, may operate to deprive a defendant of a meritorious defense, and is disapproved.
8. In such case, however, it is only when it is reasonably clear that the language used is susceptible of the meaning attributed to it in the answer and the jury may infer that it was so understood by a considerable number of the readers of the publication that proof under such pleading should be permitted.
9. In an action for libel defendant cannot attribute some hidden meaning to the words used which the readers would not be apt to discover and then proceed to justify on the basis that such meaning is the true one.
10. In libel the meaning intended by the writer is not important, unless such meaning is the natural and obvious one—the meaning that would naturally be conveyed to the readers generally.
11. The office of innuendo is to explain, not to enlarge, the meaning of alleged libelous words.
12. Where a complaint set forth libelous articles several of which did not charge a crime, it is not error to instruct the jury: "To maliciously print and publish of and concerning a man that he has been guilty of a crime is a libel, if the charge is false. It is also a libel to maliciously print and publish false statements concerning a man which tend to degrade or disgrace him or subject him to degradation, contempt, or ridicule."
13. In an action for libel where none of the alleged libelous articles could reasonably have been understood as referring to plaintiff's connection with certain questionable transactions, evidence of public notoriety of such transactions is immaterial and inadmissible as proof of mitigation of damages.
14. In libel defendant cannot mitigate damages by showing specific acts of wrongdoing on the part of plaintiff.
15. In libel evidence of mitigation of damages should be confined to the general bad character of the plaintiff and to legitimate proof tending to disprove malice.

16. Where the record fails to disclose that an item of evidence was offered, error cannot be assigned on its exclusion.

[17. Whether or not the rule that exemplary damages cannot be recovered against the principal for acts of the agent neither authorized nor ratified by the principal should be applied where the malicious act is done by the officer of a corporation intrusted with the management of its business, not determined.]

18. The character of the authority given in the first instance to the managing editor of a newspaper, owned by a corporation, publishing a libelous article, together with the subsequent conduct of the corporation, may be sufficient to support a finding that the malice of which the managing editor was guilty was also attributable to the corporation.

19. In an action for libel it is proper to permit the defendant to testify that he was not actuated by malice or evil intent toward the plaintiff; but it is not error to refuse to permit the examination to proceed further than to allow a direct and explicit denial of malice.

20. Where an alleged libelous article consisted of a statement concerning plaintiff's indictment for alleged larceny, the testimony taken before the grand jury is not admissible to establish plaintiff's guilt, although if it were charged as libelous to say that the grand jury acted on ample evidence, such testimony would be competent to prove that it did so act.

21. While sec. 4021, Stats. (1898), governing libel and slander, provides that a plea of justification, though not maintained by the evidence, shall not of itself be proof of malice, where the defendant pleads the truth in justification, it is not error to instruct the jury that an unsuccessful attempt at justification is a proper circumstance for the jury to consider in determining whether the defendant was actuated by malice. BARNES and SIEBECKER, JJ., are of the opinion that such construction of the statute is too narrow, and that a good-faith but unsuccessful attempt to justify should not be made the basis of aggravating damages, although hesitating to say that such error is of sufficient materiality to warrant a reversal.

22. Where, in an action for libel, nine causes of action were originally pleaded, three discontinued, and proof offered of the remaining six, it is not error to submit the case for a general verdict, provided the jury are properly instructed that all jurors must be agreed to find for the plaintiff as to the existence of each alleged libel before any damages can be assessed on account of the same, and that all must be agreed as to the amount of damages that should be assessed therefor.

23. A judgment will not be reversed for erroneous instructions in the absence of exceptions thereto.
24. A judgment will not be reversed for failure to instruct the jury in the absence of a request in that behalf.
25. Where the amount of the recovery is not such as to indicate passion or prejudice on the part of the jurors, the judgment will not be reversed on the ground of excessive damages.

APPEAL from a judgment of the circuit court for Milwaukee county: S. D. HASTINGS, Judge. *Affirmed.*

This action was brought to recover damages alleged to have been sustained by reason of the publication of a series of alleged libelous articles by the defendant the *Milwaukee Free Press Company* in reference to the plaintiff, and resulted in a verdict for $10,000 compensatory damages and $5,000 punitory damages in favor of the plaintiff. Judgment was entered upon the verdict, and from such judgment this appeal is taken.

Theodore Kronshage, Jr., James K. Ilsley, Howard Greene, James H. Tweedy, and H. A. J. Upham, alleged stockholders, officers, and directors of the *Free Press Company,* were originally named as defendants, but the action was discontinued as to such defendants. The original complaint embraced nine causes of action based upon nine different alleged libelous articles. The third, sixth, and eighth causes of action alleged in the complaint were dismissed before trial.

On August 4, 1905, a grand jury of Milwaukee county returned an indictment against the plaintiff charging him with having committed the crime of larceny as bailee by unlawfully, feloniously, and fraudulently having stolen, carried away, and converted to his own use the sum of $14,000, the property of the Wisconsin Rendering Company, a corporation. The indictment further recited that said sum of money was placed in the hands of the plaintiff by said corporation to be kept, used, and expended by plaintiff for the purpose of obtaining for the corporation a large and valuable contract from the city of Milwaukee for the disposal of garbage, and that

if the money was not so used it was agreed that the same should be returned to the Wisconsin Rendering Company. Upon the return of this indictment the plaintiff issued and furnished to all the newspapers published in Milwaukee a statement denying his guilt and asserting his innocence. At the time said indictment was returned the Wisconsin Rendering Company was indebted to the First National Bank of the city of Milwaukee in a considerable sum of money, which indebtedness was evidenced by overdue paper, and immediately thereafter the plaintiff purchased such paper from the holder and commenced an action thereon. In connection with the suit a statement was issued and given to the press by plaintiff's counsel to the effect that if plaintiff was indebted to said Wisconsin Rendering Company it might set up such indebtedness by way of offset or counterclaim and thus determine the question of whether the plaintiff was guilty of conversion or larceny in a civil suit, where the defense interposed might be established by a mere preponderance of evidence. The alleged libelous articles related mainly, though not entirely, to the aforesaid indictment and to the guilt of the plaintiff of the crime therein charged, or else of the crime of bribery in corruptly using the moneys deposited with him, if the same were not in fact converted by him.

The various causes of action set forth three general classes of charges: (1) The plaintiff was guilty of the crime of larceny as bailee, as charged in the indictment returned against him, or was guilty of the crime of bribing members of the common council with the moneys deposited with him by the Wisconsin Rendering Company for the purpose of procuring a favorable contract for said company with the city of Milwaukee for the disposal of its garbage; (2) the plaintiff purchased a controlling interest in the Milwaukee Sentinel, a newspaper published in the city of Milwaukee, to prevent disclosures damaging to his reputation, which were about to be made in a libel suit he had commenced against that paper

prior to his buying the controlling interest therein; (3) the plaintiff, by buying the outstanding overdue paper of the Wisconsin Rendering Company and bringing suit thereon, was endeavoring to confuse the public and to conceal his guilt by diverting attention therefrom.

The complaint further alleged that the defendant the *Milwaukee Free Press Company* was a corporation engaged in the business of publishing the Milwaukee Free Press, a newspaper having a large circulation in the city of Milwaukee and in the state of Wisconsin; that the defendant *Harry P. Myrick* was the managing editor of said newspaper at the time the alleged libelous articles were published and still is such editor, and as such had the immediate direction and control of all matters published therein, and had and has the active management of the publication of said newspaper; that for many months the said newspaper had pursued a policy of defaming and vilifying plaintiff, and had from day to day caused violent and inflammatory articles to be published of and concerning him, in which it was insinuated that he was guilty of various illegal acts; that such matter was published with the knowledge, acquiescence, and consent of the members of the governing body of the corporation; and that such policy was actuated by malice toward plaintiff and for the purpose of wantonly degrading him in the public esteem and of injuring his reputation and business; that the articles which formed the basis for this action were actuated by the same malicious purpose and were published in execution of it; that plaintiff was a man prominent in the business affairs of the city of Milwaukee, holding many positions of trust and confidence in moneyed, manufacturing, transportation, industrial, and other corporations and enterprises, as well as being the owner of a majority of the stock in the Sentinel Company, and that by reason of the defamatory publications he had suffered damages to his reputation and credit to the amount of $250,000.

Three separate defenses were interposed by the *Milwaukee*

Free Press Company to each of the nine causes of action originally set out in the complaint, and a general plea in mitigation of damages was interposed as to all of the causes of action. The first defense to the first cause of action set forth in substance that portions of the article published were omitted from the first cause of action, and that it was necessary to read the omitted portions in connection with the portion included in the complaint in order to arrive at the true tenor and meaning of the article, and such omitted portions were set forth as part of the first defense. The answer then alleged that between July 7, 1897, and February 23, 1898, there was pending before the board of public works of the city of Milwaukee, and with the common council of said city, the matter of disposing of garbage by contract with the lowest bidder for the period of five years; that said contract involved the expenditure of more than $250,000; that the Wisconsin Rendering Company was a bidder on said contract in its own name, its bid being $368,750; that it was also a bidder on said contract in the name of Cooper & Burke, such bid being $300,000; that John J. Crilley and James O'Donnell jointly bid on the same contract, their bid being $274,500; that each bid was accompanied by a bond or deposit of $20,000; that the contract was awarded to Crilley & O'Donnell; that thereafter Crilley filed with the city clerk and laid before the common council a petition purporting to be signed by Crilley & O'Donnell, asking to be relieved from said bid and the accompanying bond for certain reasons stated in such petition; that thereafter such proceedings were had that the petitioners were released and the contract was awarded to Cooper & Burke for the sum of $300,000; and that Crilley & O'Donnell were released without payment or consideration. While proceedings for release were pending, O'Donnell filed an affidavit with the city council, in which he set forth that he had not signed or authorized any one to sign the petition asking for relief, and did not know of its existence until Jan-

uary 31, 1898, and that on February 2d following he was informed by Crilley that he had an agreement with the Wisconsin Rendering Company by the terms of which said Crilley was to receive $12,000 from the Wisconsin Rendering Company as soon as the contract was awarded on the Cooper & Burke bid; that in connection with said affidavit O'Donnell filed with the city council a communication stating that he was ready to carry out said contract according to the terms of the bid of Crilley & O'Donnell; that in pursuance of such communication a committee of the common council was appointed to investigate said matter, and a large amount of testimony was taken in reference thereto; that evidence was offered tending to show that the Wisconsin Rendering Company agreed to pay Crilley & O'Donnell the sum of $25,000 in the event of their failure to go on with the contract; that the foregoing matters were published in the official proceedings of the common council and in the public press of the city of Milwaukee, and were publicly known throughout said city and the state of Wisconsin prior to August 6, 1905; that aside from the report of the indictment and arrest of the plaintiff, the published article, according to its true intent and meaning, had reference only to the garbage contract transaction and the unlawful payments of money by the plaintiff to Crilley. The answer then proceeds to deny that the words published meant or were intended to have the meaning attributed to them by the innuendoes of the complaint.

The second defense interposed pleaded the same matter by way of justification that was contained in the first defense.

The third defense adopted the averments of the first defense, and further alleged that, while the proceedings were pending before the common council of the city of Milwaukee with reference to the letting of the garbage contract, plaintiff, together with the Wisconsin Rendering Company and John J. Crilley, combined, confederated, and agreed together to defraud the city of Milwaukee out of the sum of $25,500 by

bribing said Crilley not to make good his bid and to refuse to enter into said contract, by the payment to said Crilley of a large sum of money, and thereafter and thereby procuring said contract to be let to the Wisconsin Rendering Company on the bid of Cooper & Burke; that in pursuance of such conspiracy the Wisconsin Rendering Company delivered to the plaintiff the sum of $25,000 in money, under an agreement with plaintiff and Crilley that, if Crilley & O'Donnell would not comply with their bid, the plaintiff would pay to said Crilley the sum of $15,000 out of the amount so deposited, and that if in consequence of said default the said contract should be awarded to the Wisconsin Rendering Company on the bid of Cooper & Burke, the plaintiff would pay to said Crilley the full sum of $25,000. The answer then alleged that Crilley did default; that he was paid by plaintiff for making such default the sum of $15,000; and that the contract for disposing of the garbage was awarded to the Wisconsin Rendering Company on the bid of Cooper & Burke. The answer further alleged, on information and belief, that the plaintiff at all times had knowledge of the unlawful and fraudulent character of the transactions aforesaid and participated therein with such knowledge, and that he paid over said money to Crilley as a bribe to induce him to default on his contract.

The separate answers interposed to the other causes of action were substantially the same as those pleaded in defense of the first cause of action set out in the complaint.

The general defense to all of the causes of action in mitigation of damages set out in detail the transaction in reference to the letting of the garbage contract. It also alleged that the plaintiff was a director in the Milwaukee Electric Railway & Light Company and in the Milwaukee Heat, Light & Traction Company, and that on May 26, 1899, there was verified by the mayor of Kenosha, and thereafter filed in the office of the clerk of the circuit court for Kenosha county, an an-

swer in a certain suit, the contents of which answer were published in the public press prior to the publication of the articles complained of; that such answer set forth, on information and belief, that the vote in favor of the passage of a certain ordinance passed by the common council of the city of Kenosha, granting a franchise to the Milwaukee, Racine & Kenosha Railway Company, was procured by either giving or promising to give to the members of the common council voting in favor of said ordinance, or some of them, either money or things of value; that the Milwaukee Light, Heat & Traction Company actually participated in such corrupt action; and that the plaintiff was active in the management of said corporation and had full knowledge of its affairs. Such defense also set forth that during the year 1901 the Milwaukee Electric Railway & Light Company was engaged in negotiations with the county of Milwaukee for the purchase of a parcel of land from said county for the purpose of erecting a power house thereon; that for the purpose of bringing about said purchase said company unlawfully and corruptly agreed to pay one August Puls, a supervisor of Milwaukee county, the sum of $750 as a bribe, for the purpose of influencing his vote on the sale of said real estate, and did in fact pay said sum to said Puls after he had voted in favor of making such sale; that the plaintiff, with knowledge of the corruption and as director of said corporation, retained and still retains such property, and, through a newspaper owned and published by him, ratified and approved of such corruption and bribery and discouraged and discountenanced all efforts to uncover or prosecute the same. The answer alleges substantially the same facts in reference to the corruption of Otto Siedel and Edward F. Strauss, members of the county board of Milwaukee county, in reference to the same transaction. The answer further sets forth that in the year 1901 plaintiff became prominent in a political organization known as the "Eleventh Floor League," and that said league received from the plaint-

iff large sums of money to be used for the purpose of purchasing the support and influencing the opinions of country newspapers, and that various editors and owners of country newspapers entered into a contract with said league for the purpose of deceiving the electors of Wisconsin and of corrupting the electors of the state, and that plaintiff aided and advised said league in so doing and contributed more than $30,000 for the unlawful purpose aforesaid. The answer further contains various allegations tending to show that the Milwaukee Electric Railway & Light Company corruptly used money for the purpose of securing a franchise from the city of Milwaukee, that plaintiff was actively identified with the management of said corporation, and that the corrupt practices resorted to were employed with his knowledge and consent. The answer further alleged that plaintiff aided, countenanced, and advised one Fred C. Schultz to pay money to Herman J. Pomrenning, a member of the Assembly for the state of Wisconsin, to induce him to vote in opposition to a bill pending before the legislature of the state of Wisconsin in the year 1901, which bill was entitled "A bill to provide for political nominations by direct vote."

The answer of the defendant *Myrick* did not set up any plea in mitigation. It pleaded substantially the same facts in justification that were pleaded by his codefendant the *Milwaukee Free Press Company.*

A defense was set up in the original answer which was denominated a third defense to each of the causes of action set out in the complaint. A demurrer thereto was sustained. The allegations thereof which are material to a consideration of the ruling of the court on the demurrer will be found in the opinion.

The trial court excluded evidence tending to show that plaintiff was connected with the Crilley & O'Donnell garbage transaction and also all evidence tending to show that the Milwaukee Electric Railway & Light Company or the Milwau-

kee Light, Heat & Traction Company had been guilty of bribery or other criminal acts in connection with the procurement of franchises or the purchase of the power-house site from Milwaukee county, and also all evidence tending to show the other alleged nefarious transactions with which the general answer in mitigation of damages alleged that the plaintiff had been connected. The trial resulted in a general verdict in plaintiff's favor for $10,000 compensatory damages and $5,000 punitory damages. From judgment rendered on such verdict the defendants appeal.

For the appellants there were briefs by *Edward M. Hyzer* and *W. E. Black,* and oral argument by *Mr. Hyzer* and *Mr. John J. Cook.*

For the respondent there was a brief by *Quarles, Spence & Quarles, Thomas M. Kearney,* and *Spooner & Ellis,* attorneys, and *George Lines,* of counsel, and oral argument by *Mr. Kearney* and *Mr. Lines.*

BARNES, J. 1. A third defense was originally pleaded to each of the causes of action contained in the complaint, to which a demurrer was sustained. Such defense set forth that the defendant corporation was a citizen and taxpayer of the city of Milwaukee, and that as such it was privileged to discuss and criticise governmental affairs, and public graft and dishonesty in municipal contracts, and also to discuss indictments and proceedings in court and to bring the same to the attention of the electors and taxpayers of the state; that in the exercise of such right the defendant published the matters and things set forth in the various causes of action alleged in the complaint; that the plaintiff was indicted as alleged in the complaint, and that plaintiff claimed and caused to be published a statement to the effect that he had received money from the Wisconsin Rendering Company, but disposed of it as directed by said company; that it was publicly and generally known, and the fact was, that said company

had been in negotiation with the city of Milwaukee for a contract for the disposal of its garbage, and that charges of bribery and corrupt conduct were freely made in the public press and elsewhere, during the latter part of the year 1897 and the early part of the year 1898, with reference to said contract, and that an investigation had been conducted by a committee of the common council in reference thereto, at which a large volume of testimony was taken; that it was generally understood, and the fact was, that the Wisconsin Rendering Company had been engaged in corrupt practices with reference to its contracts with the city of Milwaukee; that when the indictment was returned by the grand jury, and the attempted justification of the charge therein contained was made public by the plaintiff and was delivered to the defendant for publication, the defendant, without malice, and in the exercise of its right and privilege as a citizen and taxpayer of said city to expose, discuss, and condemn public corruption of every kind in public and municipal contracts, and not otherwise, and in the exercise of its right to criticise the pretended justification of the plaintiff, printed and published the articles complained of.

In reference to the ruling of the court sustaining the demurrer to this defense the appellants make two contentions: (1) That it was good as a plea of privilege; and (2), if not, it was good as a plea in mitigation of damages. It seems clear that the plea was one of privilege. It was so expressly denominated. The defendant corporation, as a citizen, claimed the right to discuss questions of public graft and kindred questions. It asserted that in the exercise of such right, and not otherwise, it published the articles in question. Having specifically pleaded the matter contained in the answer as a defense of privilege, it should be bound by its pleading in that respect. Affirmative proof of mitigating circumstances cannot generally be given in evidence without having been specially pleaded. *Reiley v. Timme,* 53 Wis. 63,

10 N. W. 5; *Wilson v. Noonan,* 35 Wis. 321; *Langton v. Hagerty,* 35 Wis. 151; *Hacker v. Heiney,* 111 Wis. 313, 318, 87 N. W. 249. Neither do we think the defense of "privilege" or "fair criticism and proper comment" was permissible in this case. The plaintiff held no office and was not a candidate for any. Neither did he belong to any class which by seeking and inviting public patronage renders itself amenable to public comment and criticism which could not rightly be applied to a private citizen. It appears that the plaintiff is a private citizen, and a false and defamatory publication concerning such a one is not privileged merely because it may relate to some public matter. *Werner v. Ascher,* 86 Wis. 349, 56 N. W. 869; *Buckstaff v. Hicks,* 94 Wis. 34, 68 N. W. 403; *Burt v. Advertiser N. Co.* 154 Mass. 238, 28 N. E. 1; *Park v. Detroit F. P. Co.* 72 Mich. 560, 40 N. W. 731.

The case of *Davis & Sons v. Shepstone,* L. R. 11 App. Cas. 187, 190, states the rule thus:

"It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct. In the present case the appellants, in the passages which were complained of as libelous, charged the respondent, as now appears without foundation, with having been guilty of specific acts of misconduct, and then proceeded, on the assumption that the charges were true, to comment upon his proceedings in language in the highest degree offensive and injurious; not only so, but they themselves vouched for the statements by asserting that, though some doubt had been thrown upon the truth of the story, the closest investigation would prove it to be correct. In their lordships' opinion there is no warrant for the doctrine that defamatory matter thus published is regarded by the law as the subject of any privilege."

This rule is approved by the Massachusetts court, and would seem to be particularly applicable to the facts in the case under consideration, even if it were conceded that the plaintiff was a public character. The appellant relies on the

cases of *Dakhyl v. Labouchere,* 77 L. J. K. B. 728; *Hunt v. Star N. Co.* 77 L. J. K. B. 732; and *Coleman v. MacLennan* (Kan.) 98 Pac. 281, as holding the contrary rule. The publication in the *Hunt Case* involved the official conduct of a public officer. In the *Coleman Case* the plaintiff was holding a public office and was a candidate for re-election when the article sued on was published, and the criticism complained of went to his fitness for the office. The libelous publication in *Dakhyl v. Labouchere* involved the capacity and ability of a physician who was soliciting patronage from the public. All of these cases, it seems to us, present a different principle from that involved in the present case.

2. The answer interposed contained allegations to the effect that the Milwaukee Sentinel, a newspaper owned by the plaintiff, published the indictment returned against him, together with the statement made by plaintiff in reference thereto, as well as other incidents in reference to the transaction, quite similar to the matter published by the defendant corporation, and also that like items were published in all the Milwaukee newspapers and in all the Chicago papers circulating in Milwaukee. On plaintiff's motion the foregoing allegations of the answer were stricken out, and such ruling is assigned as error. The courts generally hold that evidence of this character is improper and cannot be received in reduction or in mitigation of damages. *Palmer v. Matthews,* 162 N. Y. 100, 56 N. E. 501; *Wilson v. Fitch,* 41 Cal. 363; *Sheahan v. Collins,* 20 Ill. 325; *Gray v. Brooklyn U. P. Co.* 35 App. Div. 286, 55 N. Y. Supp. 35; *Tucker v. Lawson,* 2 T. L. Rep. 593; *Enquirer Co. v. Johnston,* 72 Fed. 443; *Sun P. & P. Asso. v. Schenck,* 98 Fed. 925. We do not hold that a defendant may not show in mitigation of damages that a libelous article was copied from another newspaper and published under the belief that it was true. Such evidence is held to be admissible. *Palmer v. Matthews, supra.* Here the portion of the pleading stricken out, at best, simply

showed that other articles of like tenor and effect to those published in the Free Press were also published in other papers. This does not present the question that is presented where a publisher shows that the article complained of was quoted from another publication and published because it was believed to be accurate.

3. After the plaintiff was indicted he purchased certain past-due notes of the Wisconsin Rendering Company and commenced action thereon. In connection with such suit a statement was given to the public press by the attorneys for the plaintiff to the effect that, if plaintiff had stolen any money belonging to the Wisconsin Rendering Company, the conversion of the money might be pleaded as a defense and the plaintiff's cause of action defeated. Certain articles were published by the defendant corporation charging in effect that the suit was not begun in good faith, but on the contrary was begun to befog the people and to intimidate witnesses and by unfair means to secure access to the evidence taken before the grand jury. On the trial the plaintiff was permitted to show that a civil suit was begun, and that the Wisconsin Rendering Company interposed no answer therein, but paid to plaintiff the amount sued for, with costs. It is urged that it was error to admit such evidence. The defendants pleaded the truth in justification. It was not incumbent on the plaintiff to negative the truth of the charges made by offering evidence tending to establish the *bona fides* of the transaction. If he saw fit to assume that burden it is difficult to see how the defendants were prejudiced thereby. It is also urged that, the plaintiff having been permitted to offer evidence in relation to this suit, the defendants should have been permitted to go into the Crilley & O'Donnell transaction. It is a sufficient reply to this to say that the plaintiff did not open up the Crilley & O'Donnell transaction by offering this evidence. The position of the plaintiff was that he had been indicted for stealing a large sum of money;

that he had commenced a civil suit against the party from whom it was alleged he had stolen, and the opportunity was now afforded such party to establish such theft and thus avoid paying the amount of the notes sued on. Manifestly, evidence tending to show that the money was paid to buy off Crilley & O'Donnell, at the request of the Wisconsin Rendering Company, was not invited by the evidence offered by the plaintiff, and neither was the door opened for its admission.

4. The plaintiff by innuendo alleged that certain of the articles published of and concerning him charged him with having committed larceny by stealing the sum of $14,000 from the Wisconsin Rendering Company, and that certain other articles accused him of committing said offense of larceny, or with having committed the crime of bribery by using said sum of money to corrupt members of the common council of the city of Milwaukee. The complaint further alleged that the readers of the newspaper placed the same meaning on the articles that was attributed to them by innuendo in the complaint. The answer denied that the publications were intended to mean or were in fact understood to mean that the plaintiff was guilty of bribing members of the common council, and alleged affirmatively that such articles were intended to mean and were understood by the readers of the paper to mean that the plaintiff had committed bribery in a colloquial sense by buying off the firm of Crilley & O'Donnell from carrying out its contract with the city and thus enabling the Wisconsin Rendering Company to secure the garbage contract at a higher figure. The defendants sought to prove the transaction by which the Wisconsin Rendering Company placed the sum of $25,000 in the hands of the plaintiff to be used by him as directed by said company, and also offered to prove that pursuant to a prearranged agreement between the rendering company, Crilley, and the plaintiff, Crilley did default in his contract, and for so doing was paid a large portion of the

money deposited with the plaintiff, and that in consequence of such action the city of Milwaukee was obliged to let the contract for about $25,000 more than the Crilley & O'Donnell bid, and that the rendering company secured the contract. The defendants contended that such transaction should be placed before the jury so that it might be able to say whether the crime of bribery of the common council was charged in certain of the articles, as alleged in the complaint, or whether bribery in a colloquial sense, in connection with the Crilley transaction, was charged, as alleged in the answer. In connection with its offer of evidence pertaining to the Crilley matter the defendants offered to show that it was a subject of public investigation and occupied a large amount of space in the newspapers at the time, and was a matter of general public discussion.

The trial court rejected all evidence relating to the Crilley transaction. It also held that the articles published did not directly charge the plaintiff with having committed the crime of bribery of the common council, but that they were susceptible of such meaning, and that it was for the jury to say whether or not such was their true meaning. The court further held that it was not permissible to aver in the answer that the plaintiff was guilty of an offense different from that referred to in the complaint and then allege, virtually, by innuendo, that the language used in the published article related to the offense set out in the answer. The view of the trial judge was that the complaint charged bribery of the common council, and, if such charge was not made in the articles, there could be no recovery, and it was immaterial what crime was in fact charged.

It seems to us that the trial court adopted a rule that was unduly restrictive upon the defendants. If the language used was susceptible of the meaning attributed to it by the answer, it is difficult to see why the defendants were not precluded, under the ruling of the court, from establishing their

defense of justification. Assuming that the answer placed the proper meaning upon some of the articles, and that defendants could prove the truth of the charge made, their defense of justification would be established. Where an article is placed before a jury, in reference to which the complaint avers that it charges a certain crime, and the jury is told by the court that the language is susceptible of being so construed, and the defendant is precluded from showing that a different meaning should be attributed to it, from a practical point of view very little is left in the way of a defense. Take the case of a doctor, concerning whom it is published that he has killed a patient by malpractice. He alleges that the article intended and was understood to mean that he killed one Smith, a patient of his, who recently died. Cannot the publisher defend by saying that he did not charge the killing of Smith, and that the article was not so understood by the readers of the paper, but that he did mean to charge that the doctor had killed Jones, another patient of his, by malpractice, and that the article was generally understood to involve such a charge, and that it was true. If he cannot, and the court tells the jury that the article is susceptible of the meaning attributed to it in the complaint, the only defense the defendant can make is one by way of argument, not supported by any evidence except the article itself.

The case of *Dufresne v. Weise,* 46 Wis. 290, 295, 1 N. W. 59, may be said to support in some measure the view of the trial court, although the discussion in that case is to the effect that the defendant cannot, in an action for slander, plead and prove that language was used different from that charged in the complaint. That case did not hold that a defendant might not plead and prove that the words used had a different meaning from that attributed to them in the complaint. Here there is no dispute about the language actually used. The case of *Bremridge v. Latimer,* 10 L. T. Rep. 816, supports the view of the circuit judge. In that case it is held that a

defendant may not impute to words a meaning different from that charged in the innuendo and then seek to justify by showing the truth of the intended meaning. The contrary rule seems to be held in Michigan. *Bathrick v. Detroit P. & T. Co.* 50 Mich. 629, 16 N. W. 172. We think that the adoption of the rule followed by the circuit court might, from a practical standpoint, operate to deprive a defendant of a meritorious defense, and for that reason we cannot approve of it. It is true that courts should be careful about permitting evidence of extraneous matters, calculated generally to heap contumely on the plaintiff, to be received. It is only when it is reasonably clear that the language used is susceptible of the meaning attributed to it in the answer, and that the jury may infer that it was so understood by a respectable number of the readers of the paper, that proof should be permitted such as the defendants attempted to offer here.

The principal contention made by counsel for the respondents is that the language used in the articles complained of was not reasonably susceptible of the meaning placed thereon by the answers of the defendants, and that therefore the court was right in excluding the evidence sought to be introduced under the answers; and the correctness of the ruling of the trial court must be sustained on this ground, if sustained at all.

The article complained of in the first cause of action related principally to the charge of larceny contained in the indictment returned by the grand jury. However, some references were made therein to briberies practiced by the plaintiff. One of the headlines read: "*Pfister* was to engineer 1901 contract." The article recited that he was "charged with stealing $14,000 given him by the Wisconsin Rendering Company for the purpose of getting through the council a contract for the disposal of the city garbage *in the year 1901.*" The article further recited:

"The facts as stated in the indictment show that he accepted from the Wisconsin Rendering Company the sum of

$14,000 to use in securing for the company the city garbage disposal contract to be let by the common council in the spring of 1901."

The article further set forth that lawyers, in discussing the indictment,

"claimed that as the true bill recited specifically that *Mr. Pfister* received the money with the understanding that he was to return it, if not used for the purposes for which it was given, he had placed himself in a position where he would have to admit bribery if he made good his contention that he had 'disbursed it years ago' as directed by Mr. Gross and admitted by *Mr. Pfister.*"

We are unable to see how this article could be understood by the readers of the paper to refer to the Crilley transaction. That took place during the latter half of the year 1897 and the early part of the year 1898. The article expressly stated that the plaintiff was to "engineer the 1901 contract" in reference to which the Wisconsin Rendering Company was negotiating with the city of Milwaukee, and that the plaintiff was charged in the indictment with stealing $14,000 which was given him for the purpose of securing the garbage contract that was to be let by the common council in the spring of 1901. The statement attributed to certain attorneys would naturally be understood by readers of the paper to refer to the 1901 transaction. The conclusions that would naturally be drawn from the portions of this article which relate to the subject of bribery would be that the plaintiff was to "engineer the 1901 contract" between the city and the Wisconsin Rendering Company; that he received $14,000 to be used in securing this contract; that he did not pay the money back to the Wisconsin Rendering Company; and if he did not steal it as alleged in the indictment, he used it for the purpose for which it was given him, to wit, to secure the 1901 contract from the city.

The article upon which the second cause of action is based was published on the day following. One of the headlines

asked the question, "For what purpose was $8,000 disbursed?" The article then proceeds:

"Who got the $14,000 *Charles F. Pfister* 'disbursed' for the Wisconsin Rendering Company? What was that much money 'disbursed' for, and why should *Mr. Pfister* have been made the disbursing agent? Or if, as Charles Quarles, *Mr. Pfister's* attorney, says, *Mr. Pfister* 'disbursed' $8,000 of the $14,000 under the direction of F. C. Gross, president of the Wisconsin Rendering Company, who got the $8,000? Who got the money *Mr. Pfister* 'disbursed' is what the grand jury wants to know. . . . *Mr. Pfister* was indicted because the grand jury had abundant evidence, direct and unimpeachable, that *Mr. Pfister* did get the $14,000 for the purpose of getting through the council a contract for the disposal of city garbage. One of two conclusions was inevitable: Either *Mr. Pfister* kept the money and converted it to his own uses or he used it in securing the adoption of the resolution letting the contract to the Wisconsin Rendering Company. The grand jury had no proof at the time it returned the indictment that *Mr. Pfister* committed bribery. It did have plenty of evidence that he accepted $14,000 from the rendering company, and that he did not return it to the Wisconsin Rendering Company as it was agreed he should if it was not used. Therefore he was indicted for larceny as bailee."

"Now *Mr. Pfister* not only admits that he 'disbursed' the money, but he stoutly insists that he disbursed it as directed by Mr. Gross. To whom did he 'disburse' it? *Mr. Pfister* did not tell. . . . Everywhere the pertinent question was asked: 'Where, how, and when did *Mr. Pfister* "disburse" the money, which he not only admits having done, but insists that he did so disburse?' *Mr. Pfister* would give no answer to the question. Mr. Quarles, as attorney for *Mr. Pfister,* was asked the same question. He replied: 'How did *Mr. Pfister* distribute it? I do not know. I do not know who got it. For the purposes of the case it is sufficient that he did distribute it, as directed.' "

The article further recited that lawyers and business men "called attention to the fact that the indictment showed plainly that the grand jury had indicted *Mr. Pfister* for larceny, because, while it might have suspected that *Mr. Pfister*

used the money to corrupt the council, it had no evidence to that effect, but did have abundant evidence that *Mr. Pfister* received the $14,000 and that he did not return it as agreed."

There is nothing in this article that is calculated to carry the mind back to any transaction that occurred in 1897. It is true that the date "1901" is not used in this article, as it is used in the preceding article, but the charge of bribery is interwoven with the charge of larceny as contained in the indictment, and the indictment stated that larceny was committed in 1901. Aside from this, the natural inference to draw from the article would be that the plaintiff was indicted for the crime of larceny, rather than that of bribery, because there was evidence before the grand jury to show that larceny was committed during the year 1901, as alleged in the indictment, whereas there was no evidence to show that bribery had been committed. Furthermore, the article stated that the evidence was plain that *Mr. Pfister* got $14,000 for the purpose of getting through the council a contract for the disposal of city garbage, and there is no suggestion in the article that the money was used for any other purpose. Of course, the purchase of Crilley might have a more or less direct bearing upon the matter of getting through the common council a contract in favor of the Wisconsin Rendering Company. But if such was the charge which it was intended to make, it is difficult to perceive why it was covered up in the manner in which it was, or why the article should have stated that the money was used to get a contract through the council. It seems to us that the ordinary reader of the paper would reach the conclusion, without any hesitation, that, if bribery in any sense was charged, it was charged by saying that the plaintiff used the money to buy members of the common council to vote for the contract. It may be conceded that the Crilley transaction was a matter of public notoriety at the time it transpired, but nearly eight years had elapsed between the time that transaction took place and the time the article was published, and

it appeared that in the meantime the Wisconsin Rendering Company was negotiating other contracts for the disposal of garbage.

The article upon which the fourth cause of action was based was also published on the 6th of August, and contained the following statements in reference to the charge of bribery made against the plaintiff:

" 'How did *Mr. Pfister* distribute it?' said Mr. Quarles, his attorney, in reply to a question. 'I do not know. I do not know who got it. For the purposes of the case it is sufficient that he did distribute it, as directed.' . . . The people of Milwaukee want to know what *Mr. Pfister* did with the $14,000 placed in his hands for the purpose of securing from the common council a valuable contract for the Wisconsin Rendering Company. *Mr. Pfister* says he received the money from President Gross of the rendering company and that he disbursed it as Gross directed. He does not say how or to whom. *Mr. Pfister's* attorney says it is a matter of no consequence. Neither *Mr. Pfister's* statement nor that of his lawyer will satisfy the public. Who got the $14,000?"

It will be observed that in this article again the inquiry is made as to what *Mr. Pfister* did with the $14,000 placed in his hands for the purpose of securing from the common council a valuable contract for the Wisconsin Rendering Company. No reference is made to the Crilley & O'Donnell transaction, but the fact that the money was to be used in securing a contract from the common council prominently appears in the article. If the article is not susceptible of meaning that the money was used for the purpose of corrupting members of the common council, we certainly do not think it would be understood to mean, or would be reasonably susceptible of meaning, that eight years before money was placed in the hands of plaintiff to buy off a competitor of the Wisconsin Rendering Company.

The only other material reference to the question of bribery is contained in an article published August 8th, which is made

the basis of the seventh cause of action. This article is more indefinite as to the nature of the bribery charge. The article recited that *Mr. Pfister* in his statement said that

"about eight years ago he received from the officers of the rendering company money for disbursement as directed by President Gross of the company, and that he disbursed some of it, and returned the remainder 'years ago.' And when Mr. Charles Quarles . . . was asked how *Mr. Pfister* distributed the money he answered: 'How did *Mr. Pfister* distribute it? I do not know. I do not know who got it. For the purposes of the case it is sufficient that he did distribute it, as directed.' Mr. Quarles may be satisfied and *Mr. Pfister* may be satisfied that it makes no difference to *Mr. Pfister,* or to the public, how *Mr. Pfister* distributed this money or 'who got it.' They may not care what the public thinks; but they may as well understand that it is thinking. It thinks it knows how the money was distributed."

The complaint alleges by way of innuendo that the language quoted meant and insinuated that the plaintiff used said money for the purpose of bribing city officials of the city of Milwaukee.

The defendants could not attribute some recondite meaning to the words used which the readers of the article would not be apt to discover and then proceed to justify on the basis of such meaning being the true one. Neither is the meaning intended by the writer of an article important, unless such meaning is the natural and obvious one and the meaning that would be conveyed to the readers of the article generally. Townshend, Slander & L. § 139; *Montgomery v. Deeley,* 3 Wis. 709; *Wilson v. Noonan,* 23 Wis. 105, 107; *Filber v. Dautermann,* 26 Wis. 518, 520; *Weil v. Schmidt,* 28 Wis. 137, 141; *Eviston v. Cramer,* 47 Wis. 659, 660, 3 N. W. 392; *Bradley v. Cramer,* 59 Wis. 309, 312, 18 N. W. 268; *Cochran v. Melendy,* 59 Wis. 207, 18 N. W. 24; *Singer v. Bender,* 64 Wis. 169, 172, 24 N. W. 903; *Solverson v. Peterson,* 64 Wis. 198, 202, 25 N. W. 14; *Guth v. Lubach,* 73 Wis. 131, 136, 40 N. W. 681; *Pandow v. Eichsted,* 90 Wis. 298,

300, 63 N. W. 284; *Dabold v. Chronicle P. Co.* 107 Wis. 357, 83 N. W. 639.

So much of the foregoing article as pertains to the charge of bribery consists substantially in repeating the inquiry contained in the former articles,—Who got the money? A reading of this article, in connection with the articles preceding it, would clearly indicate that it was not intended to relate to the 1897 transaction, but was intended to relate to the 1901 transaction. Considering the article by itself, its meaning would be more obscure. But if this article is segregated from the other articles published, we do not think it charges bribery at all or that it could be made to do so by innuendo. The innuendo may explain, but it cannot enlarge, the meaning of the words used. It is only when this article is read in connection with the series of articles which preceded it that it can be held to charge bribery in a colloquial sense or in any other sense. For this reason we think the court did not err in excluding evidence of the Crilley transaction in reference to this article.

5. The court charged the jury as follows:

"To maliciously print and publish of and concerning a man that he has been guilty of a crime is a libel, if the charge is false. It is also a libel to maliciously print and publish false statements concerning a man which tend to degrade or disgrace him or subject him to degradation, contempt, or ridicule."

It is urged that by this charge the court submitted to the jury for assessment of damages a libelous charge which did not impute the commission of a crime, and that it was therefore error for the court to exclude evidence offered by the defendants which might minimize the damages that would otherwise be assessed against them, or perhaps constitute a defense to the causes of action brought on publications which did not charge a criminal offense. It is not seriously contended that the instruction was not in itself correct. The complaint set forth several libelous articles which did not

charge a crime. One article charged that plaintiff had meretricious objects in view in purchasing the Milwaukee Sentinel, one such object being to suppress a suit which might be damaging to his reputation. Another article charged that the purpose in bringing suit against the Wisconsin Rendering Company was to befog the public and divert attention from the real controversy, and it was likewise charged that one purpose plaintiff had in view in bringing such suit was to intimidate witnesses for the state in the criminal prosecution. He was likewise charged with intent to improperly secure the evidence upon which the grand jury acted. The portion of the charge above quoted, referring to acts which did not in themselves constitute crimes, was proper enough in view of the fact that several of the articles set out in the complaint did make libelous charges without actually accusing the plaintiff of a crime. We do not understand that any material evidence was rejected which would tend to prove the truth of the statements in the articles which contained libelous matter but did not charge the commission of a felony, and we fail to see where the court erred in giving this portion of the charge.

6. It is further urged that the court erred in excluding evidence tending to show the public notoriety of the so-called 1897 garbage transaction. If the language complained of was reasonably susceptible of being understood to refer to such transaction, then it would be very proper to show that it was a matter of common knowledge or public notoriety. If a large number of the readers of the paper were conversant with the facts in reference to the Crilley deal and understood one or more of the articles to refer thereto, and the facts were proved as alleged in the answer, the defense of justification would be at least partially established as to such charge. It is manifest that, if one half of the readers of the paper understood the language to refer to a transaction that actually took place, the plaintiff would not be injured to the same

extent that he would be wronged if all of the readers understood the articles to charge a crime of which he was not guilty. Having reached the conclusion that the articles could not reasonably be understood as referring to the 1897 garbage contract, evidence tending to show the notoriety of that transaction was immaterial. The evidence was not admissible as proof of mitigation. The defendants could not mitigate damages by showing specific acts of wrongdoing on the part of the plaintiff. Such evidence should be confined to the general bad character of the plaintiff and to legitimate proof tending to disprove malice. *Storey v. Early,* 86 Ill. 461; Newell, Libel & S. 890.

7. It is urged that the court erroneously excluded a portion of one of the alleged libelous articles, which reads as follows:

"When the question was asked, 'What did *Mr. Pfister* do with the money?' I was not inclined to believe that he had used it in bribing the council, for there are other and more insidious forms of corruption. Every man who knows anything about the bidding on and the letting of city contracts knows that sometimes money is used to buy off other bidders. I am not saying that *Mr. Pfister* used it in that way, but that might have been the way he used it."

The record fails to disclose that the quoted portion of the article was offered in evidence, hence it could not have been excluded.

8. After informing the jury that a corporation was a legal entity, and as such could have no malice towards any one aside from that of the party who represented it, the court said:

"The defendant *Mr. Myrick* was the corporation's employee, the managing editor of the paper, and responsible for the articles published in it; and your only inquiry on this branch of the case is, Was *Mr. Myrick* actuated by malice in having the article published? If he was, punitory damages may be assessed against both defendants."

The pertinent inquiry in connection with this instruction is, Was the court in error in imputing the malice of *Mr. My-*

rick, if any he had, to the corporation, as a matter of law? In a large number of cases it is held that exemplary damages cannot be recovered against the principal for the wrongful and malicious act of the agent, neither authorized nor ratified by the principal. *Milwaukee & M. R. Co. v. Finney,* 10 Wis. 388; *Craker v. C. & N. W. R. Co.* 36 Wis. 657; *Bass v. C. & N. W. R. Co.* 42 Wis. 654; *Patry v. C., St. P., M. & O. R. Co.* 77 Wis. 218, 46 N. W. 56; *Mace v. Reed,* 89 Wis. 440, 62 N. W. 186; *Robinson v. Superior R. T. R. Co.* 94 Wis. 345, 68 N. W. 961; *Bryan v. Adler,* 97 Wis. 124, 72 N. W. 368; *Vassau v. Madison E. R. Co.* 106 Wis. 301, 82 N. W. 152; *Gaertner v. Bues,* 109 Wis. 165, 85 N. W. 388; *Rueping v. C. & N. W. R. Co.* 116 Wis. 625, 93 N. W. 843. The same rule is adhered to in an action to recover damages for alleged libel. *Eviston v. Cramer,* 57 Wis. 570, 15 N. W. 760. The only case we are aware of that even suggests a contrary rule is *Allen v. News P. Co.* 81 Wis. 120, 50 N. W. 1093. The correctness of the instruction as a proposition of law depends upon whether the same rule should be applied where the malicious act is done by the officer of a corporation intrusted with the management of its business that is applied in the case of an ordinary agent or employee. We do not deem it necessary to decide such a question in this case.

We think the court might well have instructed the jury that, if it found *Mr. Myrick* was actuated by malice, his malicious acts were ratified if not authorized. Very broad powers were conferred on *Mr. Myrick* in respect to the management and policy of the newspaper. He had the immediate and active charge, management, and control thereof, as well as of all matters published therein. He had all the authority the corporation itself might exercise in determining what should be published and what should be excluded. It would be illogical to say that the governing body of the corporation, in conferring such power, intended that it should be abused. But, having conferred the power, the corporation could not escape liability by saying that no authority would be found

in the record of its proceedings empowering *Mr. Myrick* to libel any one, and neither would a ratification of any libel be found therein. The publication of these articles extended over a series of seven days. The paper was read by the directors of the corporation. Apparently no protest was made by any director against the publication of the articles, and no suggestion was made that such publications should cease, except that Mr. Upham found fault, in a general way, with the character of the journalism carried on by the Milwaukee papers. This action was not commenced for a month after the publications began, and in the interim no repudiation was made of the acts of *Mr. Myrick*. The action was not tried until more than two years after it was begun, but no retraction or repudiation of the publications was ever made by the corporation. On the contrary, it answered, alleging that the publications were true. While such pleading, when the defense fails, is not proof of malice under sec. 4201, Stats. (1898), it has some force as bearing upon the ratification of *Mr. Myrick's* acts. Finally, *Mr. Myrick* was continued in the employ of the corporation, without any curtailment of powers, down to the time of the trial. It would appear, from some of the decided cases at least, that this circumstance is in itself conclusive proof of ratification. *Bass v. C. & N. W. R. Co.* 42 Wis. 654, 677; *Patry v. C., St. P., M. & O. R. Co.* 77 Wis. 218, 227, 46 N. W. 56. The cases of *Robinson v. Superior R. T. R. Co.* 94 Wis. 345, 350, 68 N. W. 961, and *Cobb v. Simon,* 119 Wis. 597, 606, 97 N. W. 276, hold that it is evidence of ratification. However this may be, we think that in this case whatever malice the defendant *Myrick* was guilty of was also attributable to the corporation, by reason of the character of the authority given in the first instance, and by reason of the subsequent conduct of the corporation.

9. In reference to the article published on the morning of August 5th *Mr. Myrick* was asked: "Now, then, was that article published by you with any malice or evil intent toward

Mr. Pfister?" To which the witness replied: "None whatever." The witness was then asked what was the purpose and intention with which the article was published. What was his motive in the publication of the article? What was the purpose and intention of the publication of the other articles set out in the complaint? What was his motive in the publication of such articles? Were the facts and circumstances connected with the so-called garbage deal within his knowledge at the time the article of August 5, 1905, was published? Did the witness know according to common report that at or prior to August 5, 1905, plaintiff was connected with the so-called garbage deal? Did the witness know according to common report that the sum of $25,000 had been deposited with the plaintiff in the summer of 1897 for the purpose of buying off the firm of Crilley & O'Donnell from their contract in order to procure the contract for the Wisconsin Rendering Company? What did the witness know as to any effort being made in the summer of 1897 to buy off the firm of Crilley & O'Donnell from a contract for the disposal of garbage? And what did the witness know of any money paid by *Pfister* to Crilley for the purpose of disposing of the contract with the city for the disposal of garbage?

Objections were interposed to each of the foregoing questions except the first, and were sustained. The witness was permitted to expressly negative malice in reference to the publication of August 5th, and presumably would have been permitted to negative malice as to other publications had questions been propounded directly asking whether or not the defendant was actuated by malice in making such publications. It was proper to permit the defendant to testify that he was not actuated by malice or evil intent toward the plaintiff. *Wilson v. Noonan,* 35 Wis. 321; *Sherburne v. Rodman,* 51 Wis. 474, 8 N. W. 414; *Plank v. Grimm,* 62 Wis. 251, 22 N. W. 470. The rule as stated in Jones, Ev. (2d ed.) § 170, is that "whenever the motive, intention,

or belief of a person is relevant to the issue, it is competent for such person to testify directly upon that point, whether he is a party to the suit or not."

We do not think the court erred in refusing to permit the examination to extend further than to allow the defendant to make a direct and explicit denial of malice. Had the examination been allowed to proceed further, it is apparent that it would have raised a number of collateral issues. The defendant was asked as to whether common report connected the plaintiff with the garbage deal, and as to whether it was commonly reported that $25,000 had been deposited with the plaintiff for the purpose of buying off the firm of contractors, and other matters that might tend, in a measure, to support the testimony of the defendant to the effect that he was not actuated by malice, but which at the same time would bring into the case a number of side issues not properly there for any other purpose. Some of the questions, too, were objectionable on the ground that the answers thereto would at least have a tendency to place before the jury the defendant's construction of the language used in the libelous articles that were made the basis of the action. Such questions were clearly improper under the decision of the court in *Wilson v. Noonan, supra.*

10. Error is alleged because of the exclusion of the testimony taken before the grand jury. It is argued that the evidence was admissible in explanation, support, and justification of the matter set forth in the first and second causes of action in relation to testimony before the grand jury. The evidence could not be received to establish the fact that the plaintiff was guilty of larceny. The witnesses to prove such fact should be produced in court so that the plaintiff would have the opportunity of cross-examination.

The article which furnished the basis for the second cause of action set forth that:

"The grand jury had no proof at the time it returned the indictment that *Mr. Pfister* committed bribery. It did have

plenty of evidence that he accepted the $14,000 from the rendering company and that he did not return it to the Wisconsin Rendering Company as it was agreed he should if it was not used. Therefore he was indicted for larceny as bailee."

A portion of the article upon which the first cause of action is based sets forth the names of the witnesses, and, to some extent, the character of the evidence produced before the grand jury and which resulted in the indictment. If it were charged as libelous to say that the grand jury acted on ample evidence, the testimony taken before it would be competent to prove that it did so act. What the plaintiff complains of in the first and second causes of action is that the defendant corporation used language that was capable of meaning, and was understood by the readers of the newspaper to mean, that plaintiff was in fact guilty of the crime of theft, or that, if he was not guilty of such offense, then he was guilty of the crime of bribery. The proof offered did not meet any charge that the plaintiff relied on to establish his case and was therefore, we think, correctly excluded.

11. The court instructed the jury as follows:

"And if it appears that *Mr. Myrick* has attempted, but failed, to prove the truth of any defamatory statement in any of the articles complained of, you may consider that fact as bearing also upon the question whether he was or not actuated by malice or ill will in publishing the statement."

The particular criticism made on this portion of the charge is that the court should have instructed the jury that an attempt to prove justification was not evidence of malice unless such attempt was made in bad faith. The following cases are cited in support of this contention: *Marx v. Press P. Co.* 134 N. Y. 561, 31 N. E. 918; *Willard v. Press P. Co.* 52 App. Div. 448, 65 N. Y. Supp. 73; *Upton v. Hume,* 24 Oreg. 420, 33 Pac. 810; *Distin v. Rose,* 69 N. Y. 122.

In New York it is held that where the answer sets up justification and the evidence fails to sustain the plea, such plea cannot be considered in enhancement of the plaintiff's dam-

ages unless it is interposed in bad faith. *Distin v. Rose, supra; Cruikshank v. Gordon,* 118 N. Y. 178, 23 N. E. 457. In *Marx v. Press P. Co., supra,* the court charged the jury that there was no evidence of malice save that shown by the publication of the article and the plea of justification, and it was held that the instruction was not erroneous; no request having been made to instruct the jury that, if the plea was interposed in good faith and not wantonly, no damages should be assessed because of its having been made. In *Willard v. Press P. Co.* 52 App. Div. 448, 65 N. Y. Supp. 73, it is held that an instruction which did not limit the jury to accepting as evidence of malice only such pleas as were interposed in bad faith was erroneous. Substantially the same doctrine is held in Oregon. *Upton v. Hume, supra.* All these decisions are made under statutes similar to our sec. 4201, which provides that a plea of justification, though not maintained by the evidence, shall not in any case be of itself proof of the malice charged in the complaint. It will be observed that the instruction of the court was directed to the evidence offered under the plea of justification and not to the plea itself. The statute provides that the answer itself shall not be considered proof of malice, even though it is not maintained. The court instructed the jury that if the defendants attempted, but failed, to prove the truth of the defamatory matter complained of, such fact might be considered as bearing on the question of ill will. The majority of the court is of the opinion that the charge was correct, and that an unsuccessful attempt at justification is a proper circumstance for the jury to consider in determining whether the defendant was actuated by malice. Personally, the writer of this opinion entertains the view that this construction of the statute is too narrow, and that where a defendant pleads, and attempts in good faith to justify, but fails to do so, such attempt should not be made the basis of aggravating the plaintiff's damages. Mr. Justice SIEBECKER also concurs in this

view. I should hesitate, however, to say that what I conceive to be the error of the court was of sufficient materiality to warrant a reversal of the judgment.

12. Nine causes of action were originally set out in the complaint. Three of these were discontinued before trial and proof was offered under the remaining six. The case was submitted to the jury on a general verdict. Such submission is alleged to be erroneous. We think that a general verdict may properly be returned in a case where a plaintiff seeks to recover on several different causes of action. The case of *Sletten v. Madison,* 122 Wis. 251, 99 N. W. 1020, relied on by the appellant, holds that such a verdict may be returned in some cases, but does not attempt to define what class of cases may properly be so submitted and what may not be. As a general proposition we see no objection to submitting a general verdict in such a case, where the jury can be properly instructed so as to protect the rights of the defendant and to avoid the objections that are generally urged against such a form of verdict in such a case. It is urged that a general verdict was improper in the instant case because some of the jurors might find for the plaintiff on one cause of action and others on different causes, and the verdict would not express the unanimous judgment of the jurors as to any particular cause of action. It is further urged that in the assessment of damages the verdict may be the result of widely variant opinions among jurors as to the amount that should be assessed on account of each particular one of the publications found to be libelous, while the aggregate result might meet the views of all. In the event of a submission such as was here made, the jury should, in substance and effect, be instructed that all jurors must be agreed to find for the plaintiff as to the existence of each alleged libel before any damages could be assessed on account of the same, and that all must be agreed as to the quantum of damages that should be assessed as compensation for such libel. Such is

the effect of the decisions of this court in *Boldt v. State,* 72 Wis. 7, 16, 38 N. W. 177; *Sletten v. Madison,* 122 Wis. 251, 99 N. W. 1020; and *Vogel v. State,* 138 Wis. 315, 119 N. W. 190. The question whether or not error resulted from the submission of a general verdict depends upon whether the court correctly instructed the jury. The verdict may have been arrived at in a manner not subject to criticism. If the instructions were correct, no error followed. If, by the instructions, the jurors were permitted to wander, and arrive at different conclusions which produced the same result in the aggregate, error was committed. It seems to us, however, that the error, if any, must be either due to the affirmative language used in the charge as given or to the negative action of the court in failing to properly caution the jurors as to how they should proceed in reaching a verdict. This court has uniformly refused to reverse judgments for erroneous instructions where no exception was taken thereto, and has likewise refused to reverse judgments because of failure to instruct where no request for instruction was made. A general verdict being proper in this case, if accompanied by appropriate instructions, we are unable to see how failure to instruct, or error in the instructions given, should be treated differently from like errors in the ordinary case. No demand was made by defendant for a special verdict. No instruction was asked that was calculated to reach the point under discussion, and, if error resulted, it must be because some portion of the charge was erroneous to which exception was taken. A careful reading of the charge fails to convince us that any affirmative error was committed in giving it. There is nothing in it that suggests that the jurors need not all agree upon the particular libel, or the damages sustained by reason thereof, before a verdict for the plaintiff might be returned. Indeed, we think the language of the court very fairly informed the jurors that all must be agreed upon the existence of each specific libel and of the damages to be re-

turned in consequence thereof, or else the plaintiff could not recover on account of the same. It is true that the charge might be made a little more direct and specific upon this point, and that there is a mere possibility that it was not sufficiently explicit to avoid harm; but, under the decisions of this court, we think that in the absence of a request for more specific instruction no error was committed. *Lela v. Domaske,* 48 Wis. 623, 4 N. W. 794; *Weisenberg v. Appleton,* 26 Wis. 56; *Kelly v. Houghton,* 59 Wis. 400, 18 N. W. 326; *Newton v. Whitney,* 77 Wis. 515, 46 N. W. 882; *Nat. Bank v. Ill. & Wis. L. Co.* 101 Wis. 247, 77 N. W. 185.

13. It is urged that the damages are excessive and that the judgment should be reversed for that reason. We are unable to say that the amount of the recovery is such as to indicate passion or prejudice on the part of the jurors; and, under the rule adopted by this court as to when judgments will be reversed because of excessive damages, we do not think the judgment in the present case should be interfered with.

By the Court.—Judgment affirmed.

TIMLIN, J., took no part.

HOMESTEAD LAND COMPANY, Appellant, vs. SAVELAND and another, imp., Respondents.

May 11—June 3, 1909.

Mortgages: Foreclosure: Personal liability: Judgment: Appeal and error: Review: Appeal from final judgment: Vacation of judgment: New trial: Order: Effect.

1. An order for a judgment for deficiency is necessarily a part of a judgment of foreclosure, and is the final adjudication of the defendant's common-law liability for the debt, the formal judgment therefor being rendered and docketed as of course on the coming in and confirmation of the report of sale showing the amount of the deficiency.

2. That part of a foreclosure judgment ordering a judgment for deficiency is appealable.
3. An appeal from a judgment for deficiency, entered after confirmation of the sale under a foreclosure judgment, does not enable the appellant to review the question of personal liability adjudicated by the foreclosure judgment, in the absence of an appeal from that judgment.
4. Where the time for appeal from a judgment of foreclosure and sale has expired, a judgment for deficiency rendered thereon is not subject to review.
5. A motion to vacate a judgment for deficiency, entered after confirmation of sale on foreclosure, is properly denied where the motion does not also include the vacation of the foreclosure judgment.
6. An order granting a motion for a new trial made after the entry of the judgment does not *ipso facto* vacate the judgment, and should not be entertained unless coupled with a motion to vacate the judgment.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

By warranty deed dated May 2, 1894, *Charles Stropahl* and wife conveyed certain premises to the defendant *William Foesch,* which deed contained the following clause:

"That there is a mortgage on said premises on which there is a balance due of three hundred sixty-five dollars ($365.00), which the party of the second part (*Foesch*) assumes as part purchase price for said premises, with interest from the date hereof."

Thereafter said *Foesch* conveyed the same premises by warranty deed to the defendant *Tennis W. Saveland,* which deed also contained the clause above quoted. Thereafter the plaintiff brought an action to foreclose the mortgage referred to in said deeds. Said *Foesch* and *Saveland* were named as defendants therein, and the summons and complaint were personally served on them. Among other things the complaint prayed that the plaintiff have judgment for deficiency against the defendants *Stropahl, Foesch,* and *Saveland.* Judgment of foreclosure and sale was entered by default

March 5, 1904. The judgment provided that if the proceeds from the sale of the mortgaged property were insufficient to pay the amount adjudged to be due, the sheriff should specify the deficiency in his report of sale, and judgment for the deficiency was ordered to be separately rendered against each of the other defendants aforesaid. On May 13, 1905, a judgment for deficiency against said defendants was entered. On January 10, 1907, the defendant *Saveland* procured an order from the circuit court for Milwaukee county upon the plaintiff to show cause why an order should not be made vacating the deficiency judgment as to him and permitting said defendant to serve and file an answer and defend the action. The motion of the defendant was granted, and it was ordered that the judgment for deficiency in favor of the plaintiff and against the defendant *Saveland* be vacated and set aside as to the defendant *Saveland* and that he be permitted to file his answer within twenty days. The court further ordered that such judgment stand as security for the collection of the debt unless the defendant filed a satisfactory undertaking in the sum of $750. The defendant *Saveland* set up by way of answer that the clause in his deed by which he assumed the mortgage indebtedness was inserted in the instrument by inadvertence and mistake. He also set up as a separate defense that after the foreclosure was commenced he executed and delivered to the plaintiff a quitclaim deed of his interest in the premises, which was received with the understanding and agreement that the action was to be discontinued as to him. The defendant *Foesch* answered denying that there was any mistake made as to the contents of the deed to *Saveland*. A trial on the merits resulted in a judgment in favor of the defendant *Saveland*. The court further held that *Saveland* was the principal debtor and that the liability of *Foesch* was that of a guarantor only, and that, the principal debtor being discharged, the judgment should also be set aside as to the defendant *Foesch*. The plaintiff appeals from such judgment.

For the appellant there was a brief by *H. M. Carpenter*, attorney, and *Cary, Upham & Black*, of counsel, and oral argument by *John J. Cook*.

G. J. Davelaar, for the respondent *Saveland*.

Charles E. Hammersley, for the respondent *Foesch*.

BARNES, J. In *Gaynor v. Blewett*, 86 Wis. 399, 400, 57 N. W. 44, the court said:

"The statute (sec. 3156, R. S.) requires that judgment for the deficiency *shall be ordered* in the original judgment. The order is a necessary part of the judgment of foreclosure, and it is a final adjudication of the defendant's common-law liability for the debt. The formal judgment is rendered and docketed as of course, on the coming in and confirmation of the report of sale showing the amount of the deficiency."

That part of a foreclosure judgment which orders a judgment for deficiency is appealable, and an appeal from the judgment entered after confirmation of sale does not enable the appellant to litigate the question of his personal liability adjudicated by the foreclosure judgment, in the absence of an appeal from that judgment. *Richards v. Land & R. Imp. Co.* 99 Wis. 625, 75 N. W. 401. Where the time has expired within which an appeal may be taken from the foreclosure judgment, the deficiency judgment rendered in accordance therewith cannot be reviewed on appeal. *Pereles v. Leiser*, 123 Wis. 233, 101 N. W. 413.

The defendant *Saveland* did not ask the court to set aside so much of the foreclosure judgment as adjudged him to be personally liable for any deficiency that might occur. The language used in the motion papers and in the order granting the relief asked for is the same. The court ordered:

"That said judgment for deficiency entered in this action on the 13th day of May, 1905, in favor of the plaintiff, and against the defendant *Tennis W. Saveland*, for the sum of $408.13, damages and costs, be, and the same is hereby, va-

cated and set aside as to the defendant *Tennis W. Saveland*, and he is hereby permitted to serve and file his answer within twenty days from the entry of this order. . . ."

This order, with precision and exactness, refers to the deficiency judgment, giving its date of entry and the amount thereof. It does not refer to the original foreclosure judgment by which the personal liability of the defendant was established. It would be only by a very far-fetched implication indeed that this order could be held to vacate and set aside any part of the original judgment. It is important that the stability and integrity of court decrees be upheld, and it seems to us that it would be doing violence to very plain and unambiguous language to hold that the words here used, in fact or by any reasonable implication, vacated any judgment or any part of any judgment except that for deficiency rendered May 13, 1905. The situation is somewhat analogous to that presented where a motion is made for a new trial after the entry of judgment. An order granting such motion would not, *ipso facto,* vacate the judgment, and the motion for a new trial should not be entertained unless coupled with a motion to vacate the judgment. *Whitney v. Karner,* 44 Wis. 563; *Bailey v. Costello,* 94 Wis. 87, 93, 68 N. W. 663.

The judgment appealed from, among other things, adjudges that the plaintiff was not entitled to a deficiency judgment against the defendants *Saveland* and *Foesch*. This provision of the judgment is directly contrary to the adjudication of the court in the foreclosure suit. The order vacating the deficiency judgment was made March 20, 1907. The moving party was conversant with the fact that judgment had been entered against him some time prior thereto. Over a year and a half elapsed after the deficiency judgment was set aside before this action was tried, and judgment therein was not entered until November 5, 1908. It is therefore apparent that no application was made under sec. 2832, Stats. (1898),

to set aside any part of the foreclosure judgment within one year after the moving party had notice of such judgment and of his rights in reference thereto.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to reinstate the deficiency judgment, and for further proceedings according to law.

SIEBECKER, J., took no part.

WAHL, Respondent, vs. TRACY and others, Appellants.

May 11—June 3, 1909.

Brokers: Duties: Diligence: Good faith: Purchase of stock: Authority: Revocation: Margins: Breach of authority: Damages.

1. A broker who accepts employment becomes the agent of the employer, and, being intrusted with money for a special purpose, owes his principal the ordinary fiduciary duties of good faith and diligence in carrying out his instructions.
2. A broker employed to purchase is not only to purchase in the manner directed by his principal, with reasonable diligence as to time, but also at the best price obtainable when the purchase is made.
3. A purchaser who has employed a broker to purchase may revoke the authority conferred at any time before the broker has in good faith acted upon the order.
4. Where a customer delivers money to a broker to purchase designated stocks, and the broker, in violation of his instructions, acquires a right to obtain stocks corresponding with the customer's order by putting up margins, it does not follow that it makes no difference to the customer that the transaction is not identical with his directions.
5. Where a broker purchases property for his principal for full cash consideration, the property from the time of the purchase is in the broker's hands free from liability to the general creditors of the broker, and the broker cannot dispose of it to any person having knowledge of the customer's rights therein, nor to an innocent purchaser, without subjecting the broker to penal liability.

6. Where a stock broker who received his customer's money with directions to purchase specific stocks purchases the stocks on margin through another broker, the customer acquires no legal right to the possession of those stocks. The selling broker may retain the stocks in his own name, unseparated and unidentified, and exact payment of the balance of the purchase price before delivery. He may also dispose of them in his own name at any time, and, when custom so authorizes, hypothecate them with others, and hence, in case of insolvency of the selling broker, arises liability that the customer can only acquire the particular stocks by paying a second time.
7. A broker, directed and authorized to acquire a clear title to stocks with money placed with him by a customer, does not execute his authority by a purchase on margin through another broker.
8. In such case the customer, after notice of his principal's acts, may revoke his order and demand return of his money.
9. Where a customer placed with a broker the money necessary to purchase certain stocks, and the broker, in violation of his instructions, purchases these stocks on margin through another broker, the first broker does not execute his customer's order until he actually acquires full title to the stocks.
10. In such situation, if the market value had depreciated when the broker actually acquires full title, he has in his hands an amount of his customer's money which it is not necessary to expend and which it is his duty to return, and for which the customer may maintain an action.

MARSHALL, J., WINSLOW, C. J., and BARNES, J., dissent.

APPEAL from an order of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

Defendants appeal from order overruling a demurrer to the complaint, which alleges that the plaintiff, a surgeon, and unfamiliar with dealings in stocks, between the 6th and 20th day of January, 1908, placed in the hands of the defendants, who were stock brokers in New York, the sum of $12,800, with direction to purchase certain specified stock at the market price, for cash, such deposit being sufficient for that purpose; that defendants, in violation of the instructions and direction given by plaintiff, and in violation of the trust and fiduciary relation between them, gave an order to another broker or brokers to purchase a corresponding amount of the specified stocks, together with other stocks, for said defend-

ants, on margin, in blank, they having said stock or securities transferred or delivered to the plaintiff; that they applied in payment of such margin only $3,000 and retained and appropriated the balance of plaintiff's deposit to their uses; that defendants fraudulently represented to plaintiff that, at all times up to the 18th day of February, they had actually purchased and fully paid for the stocks ordered for him, and that delivery to him was delayed only to enable transfers on the books of the company; that not until said 18th day of February did plaintiff learn that defendants had not purchased stocks as directed, but had made the unauthorized purchase on margins through other brokers; that he then demanded of the defendants the stocks which he had ordered purchased, and they accordingly delivered to him on February 28th certificates of stock for that amount; and that between the time of giving the order for the purchase of said stocks and such delivery of stock certificates to the plaintiff, the market price thereof depreciated $1,100, for which amount recovery was demanded.

For the appellants there was a brief signed by *Jackson B. Kemper,* counsel, and oral argument by *Mr. Kemper.*

Christian Doerfler, for the respondent.

DODGE, J. It is of course obvious, and appellants in effect concede, that the complaint categorically alleges a breach by the defendants of their duty to the plaintiff assumed by them by the acceptance of employment as brokers. By such acceptance they became agents of the plaintiff and, being intrusted with his money for a special purpose, owed to him the ordinary fiduciary duties of good faith and due diligence in carrying out his instructions. *Hill v. Am. S. Co.* 107 Wis. 19, 81 N. W. 1024, 82 N. W. 691; *Isham v. Post,* 141 N. Y. 100, 35 N. E. 1084; 1 Dos Passos, Stock Brokers (2d ed.) 218 *et seq.* The argument of appellants is, however, that no damage has resulted to the plaintiff by reason

of the failure to purchase stocks exactly as directed, for, had defendants done so, such stocks would have depreciated to the same extent by February 18th, and the effect upon plaintiff would have been the same. We think this contention is too technical and narrow to protect an agent who abuses his fiduciary relation from being called to account. The complaint shows, if nothing more, that the defendants have misappropriated to their own uses over $9,800 of the plaintiff's money for a period of about a month, for which alone would result liability at least for interest, as a profit gained by a trustee through his own wrong. But we think the facts alleged show other pecuniary injury to the plaintiff which would not have resulted from exact performance of defendants' duty. That duty was, of course, not only to purchase in the manner directed by the plaintiff, with reasonable diligence as to time, but also to purchase at the best price obtainable whenever the purchase was made, if there was a fixed market price. *Thompson v. Meade,* 7 T. L. Rep. 698; *Smith v. New York S. & P. C. H. Co.* 70 Hun, 597, 25 N. Y. Supp. 261; *Taussig v. Hart,* 58 N. Y. 425; *Larrabee v. Badger,* 45 Ill. 440; 1 Dos Passos, Stock Brokers (2d ed.) 207. Meanwhile, and until the broker had in good faith acted upon the order, plaintiff had the right of revocation. *Sibbald v. Bethlehem I. Co.* 83 N. Y. 378; *Rees v. Pellow,* 97 Fed. 167. We can view the situation in no other light than that defendants failed to act on plaintiff's order in January, when the money was delivered to them. Their claim is that by putting up margins they acquired at least a right to obtain stock corresponding with plaintiff's order, and that it makes no difference to plaintiff that the transaction was not identical with his direction. With this contention we cannot agree. Had the defendants purchased this stock for the plaintiff for full cash consideration, the same would have been his property in their hands as his agents from the time of such purchase, free from liability to the general creditors of the defendants

and which they could not dispose of to any person having knowledge of plaintiff's rights therein, and not even to an innocent purchaser without subjecting themselves to penal liability. *Richardson v. Shaw,* 209 U. S. 365, 28 Sup. Ct. 512. The rights of one for whom stocks are purchased by a broker for down payment with the client's money present none of the complicated questions as to the rights of the broker in stocks purchased for his client "on margin" discussed in some of the cases cited. When the defendants in fact purchased on margin through another broker a similar amount of stock, the situation became very different. The plaintiff acquired no right of possession to that stock, whatever legal title the defendants may have acquired; the selling broker had a right, the sale to defendants being on margin, to retain it in his own name, unseparated and unidentified, and to exact payment of the balance of the purchase price before delivery. His retention of it in his own name made it entirely possible for him to dispose of it at any time, and, under the customs in New York, he had a right to hypothecate it with others by reason of his large pecuniary interest therein. 1 Dos Passos, Stock Brokers (2d ed.) 251; *Skiff v. Stoddard,* 63 Conn. 198, 26 Atl. 874, 28 Atl. 104, 21 L. R. A. 112; *La Marchant v. Moore,* 150 N. Y. 209, 44 N. E. 770; *Markham v. Jaudon,* 41 N. Y. 235. Thus, if defendants had become insolvent at any time, plaintiff could only acquire this particular stock by paying for it again in large part; besides which, of course, the selling brokers had the right, at any time when, by fluctuations in the price of the stock, the market value was reduced to the amount of the unpaid purchase price, to sell the stock completely and cut plaintiff off from all rights therein.

It seems to us very clear that an agent directed and authorized to acquire a clear and complete title to property, with money placed in his hands for the purpose, does not in any respect execute his authority by acquiring such a fragmentary, imperfect, and perilous right therein as this. We deem

it clear that had plaintiff, after the transaction, been notified of its details, he could have ignored it completely, revoked his order, and demanded return of his $12,800. When he was prevented from enjoying or exercising that right by the fraudulent misrepresentations of the defendants, he could not be prejudiced therein as against them. He had the right at all times to the refund of his money. By fraud of the defendants he was prevented from knowing of or exercising that right. As a result it must be deemed that, until the agent's authority was executed by the actual acquirement of full title to the stock for him, the defendants were in possession of plaintiff's money under authority to purchase the specified stock at the best price obtainable. When on February 18th they did so acquire the stock, they for the first time executed plaintiff's order. At that time the market value of the stock for which they could have obtained it was $1,100 less than the sum which plaintiff had placed in their hands. They had no right to purchase at more than the market price or to turn over stock already held by them. The only logical conclusion is that defendants have in their hands that amount of plaintiff's money which they did not need to expend and which it is their duty to return to him and which he has a right to recover in an action against them.

It is suggested, with much force, that the same liability must result from another view of the transaction, namely: It being defendants' duty to purchase this stock for plaintiff and hold it as his, if their dealing with the other broker was a purchase for plaintiff, as contended by the appellants, and did vest title in him, then it was a misappropriation of his property when the defendants placed it with the selling broker to hold in pledge for their debts. It was an effective disposal of the stock by the defendants so that plaintiff was in effect deprived of it. Under such circumstances it has uniformly been held that the guilty agent is liable for the market price of the stock on the day that he so unlawfully

disposed of it, and that he cannot tender after-acquired stock in discharge of such liability; at most, that the newly acquired stock can be delivered only in mitigation of damages to the extent of its market price at the time of delivery to the principal. 1 Dos Passos, Stock Brokers (2d ed.) 258, 276; *Taussig v. Hart,* 58 N. Y. 425; *Langton v. Waite,* L. R. 6 Eq. 165; 28 Am. & Eng. Ency. of Law (2d ed.) 734.

In view of the opinion we have already expressed, that the margin purchase by defendants through another broker was not a purchase for the plaintiff, we need not decide as to the efficacy of the last-stated line of reasoning. It seems, however, to be well supported by authority and to result in a liability if the defendants' contention was sustained that the stock became the plaintiff's at the time of the original transaction.

By the Court.—Order overruling demurrer is affirmed.

MARSHALL, J. (*dissenting*). It seems to me the court, in the decision of this case, has overlooked the fundamental principles governing the subject of damages for breach of contract and the principles governing the relation of principal and agent.

The situation in brief is this: Respondent employed the appellants as brokers to purchase for him at market a specified number of shares of specified stock, depositing with them the requisite amount of money to pay in full therefor, leaving them free to obtain the stock in the usual course of business on the exchange. They executed the order through another broker, violating the precise obligations of the contract, if at all, by purchasing the stock through the secondary broker on margin instead of themselves and outright, but reported the transaction in a way to indicate the contrary, yet secured the stock for respondent at market as contemplated by the contract, though the transfer was not made on the books of the corporation except as hereafter stated. Later and after re-

spondent was informed of the real state of the case he demanded delivery of the stock and thereafter obtained the same, duly transferred. In the meantime, of which respondent was fully advised, the stock depreciated in market value, but respondent was not prevented from reselling the same. Upon discovering that it had not been transferred to him he might have revoked the order and demanded back his money, but instead of so doing he elected to take the property in accordance with the purchase and obtained the same. So, in the ultimate, he secured the stock at the market price thereof when the same should have been transferred on the books of the corporation. He was not made poorer to the amount of a penny by the irregularity in the transaction, nor were appellants to that extent enriched by such irregularity. They, to be sure, had the benefit, during the period of delay, of the use of the deposit made to pay for the stock less the amount paid by the secondary broker as the margin, but in turn, of course, were charged by him with the use to the same amount.

Now conceding there was an irregularity in the transaction constituting a breach of contract, the recoverable damages—there being no special circumstances in the transaction brought home to the respondent at the time of making the contract varying the ordinary rule, nor any special circumstance at all, so far as appears by the complaint—were limited to such as "may reasonably be considered to have been in contemplation by both parties at the time of making of the contract as the probable result of the breach of it." *Hadley v. Baxendale,* 9 Exch. 341; *Cockburn v. Ashland L. Co.* 54 Wis. 619, 12 N. W. 49; *Guetzkow Bros. Co. v. A. H. Andrews & Co.* 92 Wis. 214, 218, 66 N. W. 119; *Serfling v. Andrews,* 106 Wis. 78, 80, 81 N. W. 991; *Northern S. Co. v. Wangard,* 123 Wis. 1, 11, 100 N. W. 1066. The rule stated is universal. The idea of it is that there can be no damages in contemplation of law for breach of contract except actual pecuniary loss and such as, in view of all the circumstances

known to both parties at the inception of the contract, may be reasonably said to have been then contemplated as might naturally arise from its breach. Were there any such damages in this case? If there were, I am utterly unable to discover them.

There is nothing to show that respondent could have sold the stock at a higher than the purchase price had he wanted to during the period of delay. Any such opportunity is substantially negatived. There is nothing to show that respondent would have sold the stock during the period of delay before the depreciation occurred and thus prevented loss by depreciation. No complaint is made on that score. There is nothing to show that respondent by reason of the delay had to obtain the stock at a higher price than the market at the time the order should have been fully executed. He could have gone into the market during such period and obtained the desired stock at a less price than the value at the time the order should have been fully executed, and, since he persisted in his desire for the stock, in case he could not have obtained the same, as contemplated, if it had advanced in price his damages would have been the difference between the market at the time the order should have been executed and what he could have obtained the same for by the exercise of ordinary diligence in the open market. *Kelley, M. & Co. v. La Crosse C. Co.* 120 Wis. 84, 90, 97 N. W. 674. So, in any view that can be taken of the facts, the respondent was not injured in any way, neither were the appellants benefited in any way, in a pecuniary sense, under the rule for determining legal damages which I suppose to be universal and well known to every court. It is not referred to in terms or in effect in the court's opinion. The theory seems to be that though respondent obtained just what he contracted for and at the very price he agreed to give, he can, because of the mere irregularity in the execution of his order, obtain as damages the difference between the agreed price and the value

when he obtained possession of the property. I know of no principle or precedent justifying such theory.

The court suggests that, upon discovering the irregularity, respondent might have refused to take the stock and recovered back his money. Granted, but he did not choose to take that course, but rather to stand by the contract and demand and obtain the stock. So that suggestion instead of supporting the decision, in my judgment, condemns it as clearly wrong.

The court further suggests some contingencies upon which damages might have accrued, such as if the defendants had become insolvent during the period of delay respondent could only have acquired the stock by paying for it again to the second broker. Granted, for the purposes of the case, but nothing of that sort occurred. Legal damages are never to be predicated on mere possibilities as to what might have, but did not, in fact, occur.

Again, the court proceeds upon the theory that appellants obtained the stock, not when the order was irregularly executed but when it passed from the secondary broker to them. That is a technical way of looking at the matter. They did not purchase the stock at that time but at the time the secondary broker executed the order. The stock cost them the market price when the order, in any view of the case, should, in due course, have been executed. They did not go into the market at the late day and buy the stock at a less price, by $1,100, than the prevailing price when the order should have been executed. For aught that appears they carried, from the time the order, in due course, should have been executed, certificates of stock indorsed in blank sufficient to satisfy it. It was not necessary to pass any particular certificate through the transfer office to obtain registration for respondent of the stock going to him. So long as he obtained the number of shares ordered and at the agreed price and, since it does not appear that he desired to resell the stock, did not lose any dividend declared or paid in the meantime, nor lose any prof-

its by reason of being prevented from selling the stock during the period of delay at a higher than the market price when the order was placed and suffered no loss by reason of depreciation by reason of being prevented from selling before the depreciation occurred, he suffered no pecuniary loss. Speculating on what might have but did not occur and predicating damages thereon, in my judgment, is outside of legal principles.

The opinion of the court further proceeds upon the theory that when respondent finally demanded and obtained the stock he was ignorant of the fact that the order had been executed through the secondary broker in the irregular way and so prevented from repudiating the transaction and demanding back his money at a time when the amount thereof was $1,100 in excess of the value of the stock, but such is not the case as is clearly shown by the complaint. The pleader states that he "waited until the 18th day of February, 1908, for the delivery of said stocks, and then for the first time discovered that said stocks and certificates up to that time had not been purchased in accordance with the instructions . . . and . . . thereupon again demanded a delivery of said stock and certificates, and that the same were actually delivered on or about the 20th day of February, 1908." Thus, manifestly, the idea that respondent was prevented from electing to save himself from loss by reason of being induced to take the stock in ignorance of the irregularity, is repelled by the complaint.

Viewing the situation from the standpoint of principal and agent, in my judgment there is a fatal infirmity in the court's decision, in this: It is familiar law that if a person employed as agent to do a particular thing exceeds his authority and the principal, nevertheless, with full knowledge of the facts, accepts the result, as in this case, he thereby ratifies the unauthorized act and makes the situation the same as if authority were originally given as broad as that exercised. *McDermott v. Jackson,* 97 Wis. 64, 76, 72 N. W. 375. As indicated, it is disclosed by the complaint that respondent, with

knowledge of all facts known by him when the action was commenced, demanded and received the stock as that which appellants contracted to obtain for him, making no claim for damages because of its not having been transferred to him upon the books of the corporation at an earlier date. The action was commenced about a month after the transaction was closed and evidently was an afterthought, resorted to for the purpose of taking advantage of the irregularity in executing the order, which, by familiar rules of law, had been waived, as a means of recouping the damages caused by an unfortunate speculation, not caused to any extent by appellants' wrong. Had the stock advanced in price during the period of delay he would have had the full benefit thereof, and had the stock not been delivered he could have recovered full damages. Had the stock advanced after the transfer to him before the action was commenced to the market price when the order should, in due course, have been executed, doubtless this litigation would not have been commenced. If since the action was commenced it has advanced to a price in excess of the purchase price by the secondary broker, as we may well apprehend it has and that respondent now has the stock, the benefit is his. In short, he has all the advantages of the purchase which he could have had in any event, under the circumstances of his own conduct, and has suffered no disadvantage by reason of the irregularity, so far as appears, not even loss of opportunity to take advantage of any breach which he did not waive.

I cannot discover any ground for sustaining the complaint, and so the decision overruling the demurrer should be reversed.

WINSLOW, C. J. I concur in the views of Mr. Justice MARSHALL.

BARNES, J. I concur in the dissenting opinion of Mr. Justice MARSHALL.

INDEX.

ABUSE OF DISCRETION. See CONTINUANCE, 2, 3.

ACCEPTANCE. See CORPORATIONS, 4. GIFTS, 1.

ACCOUNTING. See ADVERSE POSSESSION, 26. APPEAL, 18. EXECUTORS AND ADMINISTRATORS, 4, 15. PARTNERSHIP, 2–5.

ACTION.

By whom brought or maintained. See EXECUTORS AND ADMINISTRATORS, 6. MUNICIPAL CORPORATIONS, 15, 16.

Conditions precedent. See CONTRACTS, 1, 5. TRIAL, 13.

Contract or tort?

1. Where the averments of a complaint are appropriate to an action in tort, and the pleader in his brief asserts that the action is in tort, the appellate court will not consider whether or not there is intent to state any other or different cause of action. *Hasbrouck v. Armour & Co.* 357

Joinder of causes of action.

2. Before a court can determine whether or not two causes of action are improperly united, it must ascertain whether there are two causes of action and then determine whether they are such as may be united. *Hasbrouck v. Armour & Co.* 357

ADMINISTRATORS. See EXECUTORS AND ADMINISTRATORS.

ADMISSIONS. See EVIDENCE, 2. PLEADING, 11, 12.

ADOPTED CHILDREN. See WILLS, 3–5.

ADVANCEMENTS. See TAXATION, 16.

ADVERSE POSSESSION.

Nature and requisites in general.

1. The fundamentals of title by adverse possession for this state are embodied in the written law. *Illinois Steel Co. v. Budzisz,* 281

Same: Acquisition of rights: Purchaser from tenant.

2. Under the provisions of secs. 4210, 4211, Stats. (1898), if A., having possession of real estate as tenant of B., the owner, in writing conveys the same to C., he having no notice of the relation of landlord and tenant as between A. and B., and C., under his conveyance, takes possession of the property, claiming title by no right except that purporting to be conferred by his writing, and remains in possession as an exclusive owner might, continuously for the full statutory period, C. thereby acquires title in fact, good as against the

former owner B., regardless of the relations existing between A. and B. at the time C. obtained his conveyance, or the provisions of sec. 4216. *Illinois Steel Co. v. Budzisz*, 281

3. The common-law principles embodied in sec. 4216, Stats. (1898), are subordinate to the statute rendering actual adverse possession for ten or twenty years, according to circumstances, efficient to accomplish a transition of title from the holder of the legal title to the adverse possessor. *Ibid.*

4. A possession of realty, characterized by the relations of landlord and tenant between the possessor and the owner, may be turned into adverse possession by a grantee of the tenant without termination of such relations by actual surrender to such owner. *Ibid.*

5. A grantee of a tenant may terminate the relations of landlord and tenant and supersede them by adverse possession by such acts as will disseise the landlord actually or constructively. *Ibid.*

6. Whenever the grantee of a tenant takes possession of the granted premises as owner under such circumstances as to bring home to the owner knowledge of the defiance of his right, such grantee becomes a trespasser. *Ibid.*

7. In the circumstances last stated, the owner cannot, at his election, treat the trespasser as his tenant. His legal remedy for the wrong is in trespass or ejectment. *Ibid.*

8. When the condition stated in No. 6 shall have been created, full disseisin, efficiently initiating adverse possession under the written law, will be effected. *Ibid.*

9. If the owner, in the circumstances last stated, permits the condition of disseisin to continue for the statutory period under sec. 4215, Stats. (1898), the presumption in his favor under secs. 4210 and 4216 will be superseded by the verity as to continuous disseisin for the statutory period requisite to a transition of the title to the disseisor. *Ibid.*

10. The statutory rule under sec. 4216, Stats. (1898), is not a legal or an equitable estoppel, but a rule of evidence to prevail till overcome by other evidence to the contrary. *Ibid.*

11. Secs. 4210, 4211, 4213, 4215, and 4216, Stats. (1898), make this Code system for the establishment of title: Starting with the common-law rule that proof of actual possession *prima facie* proves title; that is subject to displacement under the first section by proof of legal title in the adversary of the possessor; that is subject to displacement by actual possession under color of title for ten years under the second section, or without such color for twenty years, under the third section; that is subject to displacement under the fifth section by proof that the possession commenced under the owner by creation of the relations of landlord and tenant; and that is subject to conclusive displacement under the fourth section by proof that after the relations aforesaid commenced they were superseded by a disseisin as indicated in No. 6 and a continuation thereof for the statutory period as suggested in No. 9. *Ibid.*

12. If a person takes possession of premises as owner under a conveyance, in form, in fee from a tenant the nature of his possession, as to whether adverse or subordinate to the right of the true owner, is referable to his deed and the circumstances

characterizing his conduct, as to whether such as to challenge the attention of the owner of the defiance of his right, not to the real right of the grantee. *Ibid.*

Same: Privity of possession.

13. The evidence *held* to sustain a verdict to the effect that there was privity of possession between defendant and his predecessors in occupancy for more than twenty years before the commencement of the action. *Illinois Steel Co. v. Paczocha,* 23

14. There is privity of possession between one who lived upon land with his family and the members of the family who continued to occupy it as a home after his death. *Ibid.*

Same: Tacking.

15. The privity between successive occupants of land which will permit the tacking of their possessions is not dependent upon any claim, or attempted transfer, of any other interest or title in the land, but is privity merely of physical possession not derived from or in subordination to the true owner. *Illinois Steel Co. v. Paczocha,* 23

16. Where the possessions of successive occupants other than the true owner join by delivery from predecessor to successor, there is no opportunity for the true owner to become seised, and after twenty years' submission to such inability he becomes barred by sec. 4207, Stats. (1898), irrespective of the terms of sec. 4215. *Ibid.*

Same: Continuity of possession.

17. The presence of surveyors locating points, and the failure of the occupant to protest against the entry upon his premises, do not conclusively show a disseisin of the occupant, breaking the continuity of his adverse possession. *Illinois Steel Co. v. Paczocha,* 23

Same: Hostile character of possession.

18. When the physical fact of possession has existed for the statutory period the law supplies the hostility and adversary intention, subject only to the qualification that such possession was not in fact derivative from and subordinate to the true title. *Illinois Steel Co. v. Paczocha,* 23

19. When defendants have proved twenty years' continuous occupation by actual, open, notorious, and exclusive possession such as the premises were adapted to, and as was reasonably sufficient to attract attention of the true owner and put him on inquiry as to the nature and extent of the invasion of his rights, they have, by force of sec. 4210, Stats. (1898), proved that "adverse" possession which, by secs. 4207 and 4215, creates title in them. *Ibid.*

Same: Evidence.

20. Possession of land and voluntary transfer thereof are physical facts provable by the testimony of an eye or ear witness or any other evidentiary fact or conduct. *Illinois Steel Co. v. Paczocha,* 23

21. The evidence *held* to sustain a finding that defendant's predecessor in possession did not sign a lease whereby her possession became subordinate to the true title. *Ibid.*

22. Evidence of claims made by a person adverse to the rights of defendant in land occupied by him was admissible as preliminary to and explanatory of a settlement by which such person released his rights to defendant. *Ibid.*

Operation and effect: Title and right acquired: Good faith of entry.

23. An action to recover real estate in the adverse possession for over ten years of one claiming under an instrument purporting to convey a colorable title is barred, although the action is brought by minors, or those under guardianship, or to meet cases of fraud. *Steinberg v. Salzman,* 118

24. Title by adverse possession under the ten-year statute as well as the twenty-year statute may be acquired although there is no element of good faith in the entry or in securing the deed under which entry is made, where the ten-year statute is invoked, provided the essentials required by the statute exist. *Ibid.*

Same: Color of title.

25. An administrator's deed, conveying decedent's homestead pursuant to an order of court in proceedings to sell decedent's lands for the payment of his debts, is color of title within the statutes. *Steinberg v. Salzman,* 118

Same: Liability to account for value of premises.

26. Where real estate itself, in the possession of one holding it adversely, cannot be recovered, the possessor cannot be called upon to account for its value, even though he was guilty of fraud in its acquisition, which was not discovered until shortly before the institution of the action for an accounting. *Steinberg v. Salzman,* 118

ALTERATION OF INSTRUMENTS.

See REPLEVIN, 1.

On conflicting evidence the trial court having found that a written instrument was altered in a material particular after its execution, such finding is affirmed, the appellate court being unable to say that the finding is contrary to the weight of evidence. *Cleary v. Cleary,* 500

AMBIGUITY. See CONTRACTS, 7.

AMENDMENT.
Of pleading. See PLEADING, 5–7. STREET RAILWAYS, 5.
Of statutes. See CORPORATIONS, 17. DAMAGES, 5, 6. STATUTES.

ANSWER. See LIBEL AND SLANDER, 6. PLEADING, 8, 9.

APPEAL AND ERROR.

Nature and grounds of appellate jurisdiction. See TAXATION, 20.

Decisions reviewable: Deficiency judgment. See MORTGAGES, 4, 6, 7.

Record: Exceptions: Review of findings. See COURTS, 2.

1. Where the bill of exceptions contains no exceptions to the findings, a contention that there is no evidence to support a particular finding is not tenable. *Van Eps v. Newald,* 129

2. The supreme court will not consider an assignment of error to the admission of evidence in the absence of sufficient exception. *Gould v. Merrill R. & L. Co.* 433

3. A judgment will not be reversed for erroneous instructions in the absence of exceptions thereto. *Pfister v. Milwaukee Free Press Co.* 627

Bill of exceptions. See APPEAL, 1, 27.

Assignments of error. See APPEAL, 2. EVIDENCE, 11. TRIAL, 23.

4. Assignments of error as to the rejection of evidence, leaving the supreme court to search for the particular rulings and offered evidence referred to and the relation thereof to other evidence in the case, will ordinarily be disregarded. *Hoag v. Nanstad,* 455

5. Where the record fails to disclose that an item of evidence was offered, error cannot be assigned on its exclusion. *Pfister v. Milwaukee Free Press Co.* 627

Review: Questions considered. See ACTION, 1. APPEAL, 2. MORTGAGES, 5, 6.

Same: Findings, when disturbed. See ALTERATION OF INSTRUMENTS. APPEAL, 15. CORPORATIONS, 7. EXECUTORS AND ADMINISTRATORS, 1, 2.

6. The determination of the trial court on a question of fact will not be disturbed unless clearly wrong. *Hoag v. Nanstad,* 455

7. Findings of fact supported by competent evidence and not opposed to a clear preponderance thereof will not be disturbed on appeal. *Will of Jacobs,* 457

8. Findings of the trial court as to disputed facts not against the clear preponderance of the evidence will be affirmed. *Heber v. Estate of Heber,* 472

9. On a trial by the court without a jury, there being competent evidence to sustain the court's findings, the admission of incompetent evidence is not ground for reversal. *Cleary v. Cleary,* 500

10. The decision of the trial court must prevail unless it appears from the record to be clearly wrong. *Schiefelbein v. Fidelity & C. Co.* 612

Same: Conclusiveness of adjudication. See EVIDENCE, 12.

11. A verdict for damages, based on sexual impotence resting on opinion evidence which does not commend itself to the supreme court as reasonable or sound, will not be given the weight to which a verdict is entitled where it rests upon facts. *Bucher v. Wis. Cent. R. Co.* 597

12. While the verdict of a jury founded upon facts is entitled to great weight and is almost conclusive in the supreme court if supported by any evidence, yet a verdict founded only upon the opinion of experts concerning the cause of a condition, which condition is itself established by the opinion of experts, has not such weight. *Ibid.*

13. Opinions of medical men may be rejected as an insufficient basis for a finding of fact by a jury where the court is convinced that reasonable certainty is outside of the possibilities of the situation. *Ibid.*

14. Obvious error of opinion based on insufficient data may be disregarded by the supreme court as a basis for supporting a verdict. *Ibid.*

Same: Clear preponderance of the evidence. See APPEAL, 7, 8.

15. On appeal to the supreme court a clear preponderance of the evidence is required to warrant weighing conflicting evidence and reversal of the findings of the court below. *Ott v. Boring,* 403

16. "Clear preponderance" of the evidence requires the preponderance to be so apparent as to manifestly outweigh any probable legitimate influence upon the trier of those advantages for discovering the truth which the reviewing tribunal cannot have. *Ibid.*

Same: Findings of referee.

17. Findings of a referee, as regards being disturbed by the trial court on review, have the same dignity as findings of that court when challenged in the supreme court for error. *Ott v. Boring,* 403

Same: Affirmance and reversal: Material and immaterial errors. See APPEAL, 3. ASSAULT AND BATTERY, 2–7. CONTINUANCE, 5. CORPORATIONS, 11. CRIMINAL LAW, 1, 5–10, 17. DAMAGES, 10, 12. EMINENT DOMAIN, 1, 3, 4, 6, 7, 11. EVIDENCE, 6, 8, 11. EXECUTORS AND ADMINISTRATORS, 1–3. HOMICIDE, 3. INSANE PERSONS, 1. LIBEL AND SLANDER, 6, 15, 17–19. MASTER AND SERVANT, 22. NEGLIGENCE, 19. PARTNERSHIP, 2. RAILROADS, 10, 12, 14, 15. TRIAL, 5–12, 15–19, 23. WITNESSES, 7.

18. Where the correctness of an account between the parties as stated by the referee and lower court is sustained by the evidence, it will not be disturbed on appeal. *Lemma v. Blanding,* 156

19. The drawing of a jury for the trial of the cause, after issue joined but before filing the summons and complaint, is not error of which one who has participated in the selection of the jury can complain. *Gould v. Merrill R. & L. Co.* 433

20. In the absence of proof of actual misconduct on the part of the jury, it is not prejudicial error to refuse to discharge the jury and grant a *venire de novo* upon the ground that the trial, interrupted by adjournment, had been continued over a period of six weeks, although but six days of that time was spent in actual trial. *Ibid.*

21. Error in rejecting competent evidence is harmless where the same witness is permitted to give such evidence fully on cross-examination. *Ibid.*

22. In a case tried by the court there can be no reversal because of the improper admission of evidence. *Will of Jacobs,* 457

23. A judgment will not be reversed for failure to instruct the jury in the absence of a request in that behalf. *Pfister v. Milwaukee Free Press Co.* 627

Determination and disposition of cause: Modification and correction of error.

24. Error based on mere computation of interest can be corrected by the supreme court, and the judgment, modified so as to correct the error, will be affirmed. *Lemma v. Blanding,* 156

25. Where the only prejudicial error affects the amount of damages, which can be corrected by reduction to the proper amount, the judgment is modified and affirmed. *Keeley v. Great Northern R. Co.* 448

Costs: Printed case.

26. A printed case violating Supreme Court Rule 6, on reversal costs for its printing are denied. *Sparks v. Wis. Cent. R. Co.* 108

27. The printing without abridgment of the evidence preserved in the bill of exceptions is a violation of Supreme Court Rule 6, and warrants denial of costs for printing the case. *Steinberg v. Salzman,* 118

28. Printing the case without abridgment of the evidence necessary to present the questions for decision is a violation of Supreme Court Rule 6, and no costs therefor can be recovered. *Johanson v. Webster Mfg. Co.* 181

29. A printed case not confined to matter necessary to present questions raised on appeal, and not even an abridgment thereof, violates Supreme Court Rule 6, and costs for its printing are within the prohibition of Rule 44. *Herring v. E. I. Du Pont de Nemours P. Co.* 412

30. Where the printed case does not comply with Supreme Court Rule 6, no costs will be taxed therefor. *Keeley v. Great Northern R. Co.* 448

ARGUMENT OF COUNSEL. See CRIMINAL LAW, 1.

ARREST. See FALSE IMPRISONMENT.

ASSAULT regardless of human life. See ASSAULT AND BATTERY, 7.

ASSAULT AND BATTERY.

Civil liability. See PLEADING, 4.

1. In an action for assault and battery, evidence of the wealth of the defendant is competent as bearing on the sum which would be just and sufficient as a punishment and deterrent in case of an award of exemplary damages. *Thomas v. Williams,* 467

Same: Self-defense: Instructions to jury.

2. In an action for assault and battery, under the facts, stated in the opinion, it is not error to instruct the jury relative to the law of self-defense. *Thomas v. Williams,* 467

3. In an action for assault and battery, in the absence of requests in that behalf, it is not error to omit to define "malice," although the court used the word "maliciously" several times in its charge. *Ibid.*

4. In an action for assault and battery, an instruction as to exemplary damages, that the jury "should" consider defendant's wealth and that the damages "should" be proportioned to defendant's ability to respond, while mandatory instead of permissive, is not cause for reversal unless it appears that the defendant was prejudiced thereby. *Ibid.*

5. Such instruction, taken in connection with the whole charge, is *held* not misleading. *Ibid.*

6. In an action for assault and battery, an instruction that a preponderance of the evidence which satisfied the jury of the existence of damage to the plaintiff might form a basis for recovery, is not erroneous as instructing the jury to use that as a basis for prospective or future damages, where no recovery of such damages was authorized or had. *Ibid.*

Criminal liability: Assault regardless of human life.

7. In a criminal prosecution for assault regardless of human life, it was *held* error to exclude testimony stated in the opinion. *De Blazio v. State,* 534

ASSESSMENT.
Of damages. See DAMAGES, 7.
Of taxes. See MUNICIPAL CORPORATIONS, 18–22. TAXATION, 1–4, 7.

ASSIGNABILITY of contracts. See CONTRACTS, 3–6.

ASSIGNMENTS OF ERROR. See APPEAL, 2, 4, 5. EVIDENCE, 11. TRIAL, 23.

ASSUMPTION OF RISK. See MASTER AND SERVANT, 18, 19. TRIAL, 22.

BAD FAITH. See ADVERSE POSSESSION, 23, 24. EMINENT DOMAIN, 2.

BAKERIES. See STATUTES, 2.

BEACH. See MUNICIPAL CORPORATIONS, 2, 3. NAVIGABLE WATERS, 3.

BENEFITS. See EMINENT DOMAIN, 9. MUNICIPAL CORPORATIONS, 18, 22.

BILL OF EXCEPTIONS. See APPEAL, 1, 27.

BILLS AND NOTES.

Negotiable Instrument Law.

1. In all situations where the Negotiable Instrument LAW (ch. 356, Laws of 1899) conflicts with the adjudications of the supreme court, as to instruments made subsequent to its passage the former prevails. *First Nat. Bank v. Miller,* 126

Negotiability.

2. A provision in a note for "ten per cent. attorney's fees if collected by an attorney, or if suit is brought upon this note," does not render the note nonnegotiable. *First Nat. Bank v. Miller,* 126

Indorser or joint maker: Intent.

3. A note made in Michigan was sent by the maker to defendant in this state for his signature. Defendant signed it on the back, and by direction of the maker sent it to the payee in Michigan. *Held,* that defendant's liability on the note was governed by the law of Michigan. *Hackley Nat. Bank v. Barry,* 96

4. Under the law of Michigan the presumption that defendant was an indorser only, arising from the fact that his signature was on the back of the note, was rebutted by proof that he signed before delivery of the note; and such signature, not otherwise explained, renders him liable as a joint maker. *Ibid.*

5. Neither under the law of Michigan nor under that of Wisconsin could the apparent obligation of defendant be varied by proof of his mental purpose in the transaction, whether communicated to other parties to the note or not. *Ibid.*

Notice of dishonor and protest.

6. Under sec. 1678—34, Stats. (ch. 356, Laws of 1899), notice of dishonor of a negotiable note is *held* too late, under the evidence, stated in the opinion. *First Nat. Bank v. Miller,* 126

BONDS. See CORPORATIONS, 1, 2. STREET RAILWAYS, 2–4.

BOOKS OF ACCOUNT. See EVIDENCE, 5.

BROKERS.

1. A broker who accepts employment becomes the agent of the employer, and, being intrusted with money for a special purpose, owes his principal the ordinary fiduciary duties of good faith and diligence in carrying out his instructions. *Wahl v. Tracy*, 668

2. A broker employed to purchase is not only to purchase in the manner directed by his principal, with reasonable diligence as to time, but also at the best price obtainable when the purchase is made. *Ibid.*

3. A purchaser who has employed a broker to purchase may revoke the authority conferred at any time before the broker has in good faith acted upon the order. *Ibid.*

4. Where a customer delivers money to a broker to purchase designated stocks, it does not follow that it makes no difference to the customer that the acts of the broker are not identical with his directions. *Ibid.*

5. Where a broker purchases property for his principal for full cash consideration, the property from the time of the purchase is in the broker's hands free from liability to the general creditors of the broker, and the broker cannot dispose of it to any person having knowledge of the customer's rights therein, nor to an innocent purchaser, without subjecting the broker to penal liability. *Ibid.*

6. Where a stock broker who received his customer's money with directions to purchase specific stocks purchases the stocks on margin through another broker, the customer acquires no legal right to the possession of those stocks, and, if the selling broker hypothecates them with others, the customer can only acquire the particular stocks by paying a second time. *Ibid.*

7. A broker, directed and authorized to acquire a clear title to stocks with money placed with him by a customer, does not execute his authority by a purchase on margin through another broker. *Ibid.*

8. In such case the customer, after notice of his principal's acts, may revoke his order and demand return of his money. *Ibid.*

9. Where a customer placed with a broker the money necessary to purchase certain stocks, and the broker, in violation of his instructions, purchases these stocks on margin through another broker, the first broker does not execute his customer's order until he actually acquires full title to the stocks. *Ibid.*

10. In such situation, if the market value had depreciated when the broker actually acquires full title, he has in his hands an amount of his customer's money which it is not necessary to expend and which it is his duty to return, and for which the customer may maintain an action. *Ibid.*

BURDEN OF PROOF. See EVIDENCE, 1. LIBEL AND SLANDER, 7. SCHOOLS AND SCHOOL DISTRICTS, 3, 4. TRIAL, 8, 9, 19.

BURGLARY.

Under sec. 4409, Stats. (1898), the words "any other building" are not intended to include a schoolhouse or other building erected or employed for public purposes. *Howard v. State*, 529

CAPITAL STOCK. See CORPORATIONS, 1–7, 13, 15–17.

CAPTAIN OF POLICE. See MUNICIPAL CORPORATIONS, 8.

CERTIFIED QUESTIONS. See CRIMINAL LAW, 13–16.

CHARACTER. See LIBEL AND SLANDER, 12.

CHATTEL MORTGAGES. See REPLEVIN.

CHIEF OF POLICE. See MUNICIPAL CORPORATIONS, 8, 9.

CIRCUIT COURTS. See INSANE PERSONS. MUNICIPAL CORPORATIONS, 13, 14.

CITY MARSHAL. See MUNICIPAL CORPORATIONS, 7, 8.

CLAIMS. See EXECUTORS AND ADMINISTRATORS, 1–3. INSANE PERSONS.

CLASSIFICATION. See CONSTITUTIONAL LAW, 3, 4, 8. MUNICIPAL CORPORATIONS, 3.

CLOUD ON TITLE. See ADVERSE POSSESSION. TAXATION, 5.

COMMERCE.

Interstate commerce. See CORPORATIONS, 16.

1. Where goods are shipped by a resident of another state to his commission agent in Wisconsin, not in response to an order from a purchaser, but to be held as part of his stock of commission goods in Wisconsin, a sale and delivery thereof by the commission agent is not a transaction of interstate commerce. *Duluth Music Co. v. Clancy,* 189
2. The place of payment specified in a note given for the purchase of goods under such circumstances, even if in another state, has no bearing upon the question of whether or not the sale and delivery in Wisconsin was an act of interstate commerce. *Ibid.*

COMMON COUNCIL. See MUNICIPAL CORPORATIONS, 10, 13, 15.

COMPENSATION. See EMINENT DOMAIN, 1–7. WITNESSES, 1–3.

COMPLAINT. See ACTION. CONTRACTS, 5, 6. NEGLIGENCE, 14. PLEADING, 1–7. TAXATION, 7. WITNESSES, 3.

CONDITIONAL SALES. See CORPORATIONS, 8, 9.

CONDITIONS PRECEDENT. See CONTRACTS, 1, 5, 13. TAX TITLES, 4.

CONSIDERATION. See CONTRACTS, 9. CORPORATIONS, 1, 2.

CONSPIRACY. See CRIMINAL LAW, 2–4.

CONSTITUTIONAL LAW.

Distribution of governmental powers and functions: Legislative powers. See CORPORATIONS, 10.

Same: Taxation: Inheritance tax. See TAXATION, 12.

1. The legislature is not limited to the levying of excise taxes upon privileges, transactions, or occupations which it alone authorizes and which it can entirely abolish, but may levy excise taxes upon the transfer or devolution of property. *Beals v. State,* 544
2. Sec. 1, art. VIII, Const., does not limit taxation to property only. *Ibid.*
3. In taxing property there can be no classification which interferes with substantial uniformity of rate based on value. *Ibid.*

4. In excise taxation there may be proper classification and different rates applied to different classes; the term "uniformity of taxation" meaning simply taxation which acts alike on all persons similarly situated. *Ibid.*

5. The inheritance tax levied by ch. 44, Laws of 1903, is not a tax upon property or property rights, but is purely an excise tax levied upon the "transfer" or transaction, and merely measured in amount by the amount of property transferred. *Ibid.*

Same: Uniformity: Discriminations. See CONSTITUTIONAL LAW, 3, 4.

6. Inheritance taxation is constitutional on the ground that it is an excise taxation levied on the transfer of property and not on the property itself, and hence not subject to the rule of uniformity as applied to taxation of property, but subject alone to the general rule of uniformity. *Beals v. State,* 544

7. While by secs. 2, 3, ch. 44, Laws of 1903, no specific provision appears for taxation of the transfer of the first $25,000 of an estate exceeding that sum, other sections of the law justify a construction demonstrating a legislative intent to tax the first $25,000, except exemptions, in all estates, great or small. *Ibid.*

8. Neither the classification between relatives in various degrees and strangers nor the progressive features of the inheritance tax law (ch. 44, Laws of 1903) violate the true principles of classification. *Ibid.*

9. Ch. 44, Laws of 1903, is a proper exercise of the taxing power of the state; taxes levied thereunder are valid and in the nature of excise taxes, and not a tax upon property within the meaning of sec. 1, art. VIII, Const.; and the act does not violate the constitutional guaranties of the equal protection and the uniformity in operation of the laws. *State v. Pabst,* 561

10. The provisions of ch. 44, Laws of 1903, for discount if tax is paid within one year, and for charging interest and penalties on delayed payments, are not discriminatory and impossible of performance. *Ibid.*

11. Ch. 44, Laws of 1903, is not invalid because it imposes a tax on transfers limited to vest on contingencies which may never happen, to persons not in being or ascertainable, or on transfers of defeasible estates which may never go to the persons who are taxed. *Ibid.*

12. Neither does payment of the tax by the present owners of defeasible estates operate to unjustly tax them. *Ibid.*

Same: Delegation of legislative powers. See NAVIGABLE WATERS, 1-5.

Same: Inheritance or devolution of property. See TAXATION, 13.

13. The right to receive property by inheritance or will is an inherent right, subject to reasonable regulation and taxation, but not to abrogation by the legislature. *Beals v. State,* 544

Class legislation. See CONSTITUTIONAL LAW, 3, 4, 8. MUNICIPAL CORPORATIONS, 3.

Equal protection of laws. See CONSTITUTIONAL LAW, 8.

CONSTRUCTIVE POSSESSION. See TAX TITLES, 2.

CONTINUANCE.

1. An application for a continuance under Circuit Court Rule XIX may be resisted by counter affidavits as to facts other than the materiality of evidence referred to in the moving affidavit. *Miller v. State,* 57

2. Such an application is addressed to the sound discretion of the court, but it satisfactorily appearing that the desired testimony is material to the moving party's case and that all the essentials of Circuit Court Rule XIX are satisfied even in the light of counter affidavits, in the legitimate field for such proofs,—to deny it would be an abuse of discretion. *Ibid.*

3. The decision of a trial court on an application for a continuance, within the field of discretion, is conclusive. *Ibid.*

4. In case of an application on the part of an accused, for a continuance in a criminal case, the situation being such that it is within the field of discretion whether to grant or deny the same, the court may take the latter course, conditioned upon the prosecution admitting upon the record that the absent witness would, if produced, testify as claimed, the same to be considered by the jury as if testified to by the witness upon the trial. *Ibid.*

5. If upon a criminal trial the accused makes such an application for a continuance on the ground of the absence of a witness, which is not within discretion to deny, it is error to do so on condition that such a concession be made as indicated in the last foregoing paragraph, but it may be done upon condition of the prosecution admitting the truth of the testimony which it is claimed the absent witness would give if present. *Ibid.*

CONTRACTS.

Executory contracts. See MUNICIPAL CORPORATIONS, 15–17.

Implied contracts. See WITNESSES, 1.

Illegal contracts. See CORPORATIONS, 8–17.

Entire contracts: Breach.

1. The rule that where performance of an entire contract is stipulated in exchange for a specified consideration, performance in full is a condition precedent to a rightful claim for such consideration, does not apply to release from performance in part of an entire contract which is easily severable and may be and is severed into parts to the advantage of the person who has paid for full performance. *Williams v. Arnold,* 177

2. Where defendants sold two houses to plaintiff for a paid sum, agreeing to keep both houses rented for a certain period, the selling of one does not release defendants from their agreement to keep the other rented. *Ibid.*

Requisites and validity. See CORPORATIONS, 4, 8–17. MUNICIPAL CORPORATIONS, 15–17.

Same: Consideration. See CONTRACTS, 9. CORPORATIONS, 1, 2.

Assignability.

3. A contract with individual subscribers inexperienced in the business, for the erection and equipping of a canning factory according to specifications, which requires skill and experience and imposes liability upon the contractor, involves a relation of

personal confidence, and is not assignable by the contractor without the consent of the individual subscribers. *Johnson v. Vickers,* 145

4. In the absence of evidence which would establish consent, ratification, or estoppel, the assignees of a nonassignable contract cannot recover from the other party. *Ibid.*

Same: Pleading.

5. In an action by the assignees of a contract, a valid assignment of the contract is a necessary allegation of the complaint, is put in issue by a general denial, and, unless such allegation is supported by proof, the assignee cannot recover. *Johnson v. Vickers,* 145

6. In an action by the assignees of a contract, failure to plead a valid assignment is not waived by failure to demur. *Ibid.*

Construction. See PARTNERSHIP, 1. STREET RAILWAYS, 1.

7. A stipulation in a contract that if a stallion purchased should not prove an average foal getter the seller would replace him with another horse of the same breed and age "equally as good," while ambiguous, is made certain by evidence that the intention of the parties was that the substituted horse should comply with the warranty as to being an average foal getter. *Smith v. Goldberg,* 423

Modification.

8. Negotiations of settlement, by substitution of another article in place of that contracted for, in no way modify the contract or relieve from performance. *Smith v. Goldberg,* 423

Parol modification: Escrow.

9. A written contract may be modified by parol, without any new consideration, after it has taken effect; but a bill of sale, while it is in escrow awaiting the payment of the purchase money, cannot be modified by parol. *Schoblasky v. Rayworth,* 115

Rescission. See CORPORATIONS, 9.

10. Where a contract of sale is invalid on account of mistake or fraud, and the seller seeks by replevin of the goods to rescind the contract, he must first return what he has received. *Duluth Music Co. v. Clancy,* 189

11. A notice served before action brought, stated in the opinion, is not a rescission in the ordinary sense, but rather a notice of claim for breach and demand of the purchaser's damages under the contract. *Smith v. Goldberg,* 423

Performance or breach. See LANDLORD AND TENANT.

Same: Substantial performance.

12. Where substantial performance of a contract to furnish and install a boiler for heating according to specifications is shown, the contractor seeking to recover need not produce evidence tending to show the reasonable value of the boiler installed. *Per* WINSLOW, C. J., *concurring:* Substantial performance means strict performance in all essentials necessary to the full accomplishment of the purposes for which the thing contracted for was designed. *Mueller v. Burton,* 384

Same: Proof of damages.

13. On breach of a contract of sale of a stallion, the agreement being on failure of warranty to replace him with another equally

good, or refund the purchase price "and take the horse back," no proof of damages is necessary, nor is the return of the stallion a condition precedent to the purchaser's right to recover. *Smith v. Goldberg,* 423

CONTRIBUTORY NEGLIGENCE. See MASTER AND SERVANT, 20, 21. NEGLIGENCE, 18. RAILROADS, 12, 13. TRIAL, 2, 22.

CONVEYANCES. See ADVERSE POSSESSION, 2–12, 23–25. EVIDENCE, 7, 8.

CORPORATIONS.

Capital stock: Subscription: Payment.

1. Stock or bonds issued in violation of the provisions of sec. 1753, Stats. (1898), may be validated by paying a full consideration therefor without surrender and without reissue. *Haynes v. Kenosha Electric R. Co.* 227
2. Sec. 1753, Stats. (1898), does not require that payment of the consideration must be contemporaneous with the issue of stock or bonds, and stock or bonds issued on a supposedly valid consideration may be validated by the subsequent delivery of the required consideration. *Ibid.*
3. An organized corporation, as such, has the right to offer for sale its unsubscribed capital stock and to make a valid sale of the same. *Southwestern Slate Co. v. Stephens,* 616
4. Where an organized corporation offers to sell its capital stock at a stipulated figure, an acceptance of the offer makes a binding contract. An acceptance of the acceptance is unnecessary. *Ibid.*
5. Subscribers to unsold capital stock of a corporation become members thereof, and the corporation becomes bound to deliver the muniments of title showing the interest the subscribers have acquired in the corporation, which may be compelled by appropriate proceedings in courts. *Ibid.*
6. A subscriber for unsold capital stock of a corporation, by virtue of his contract of purchase, becomes entitled to enforce the ordinary rights of stockholders against the corporation. *Ibid.*

Same: Taxation.

7. Where the evidence of value of corporate stock is sufficient to sustain the conclusions of the trial court in its appraisement for the purpose of inheritance taxation, such findings must stand. *State v. Pabst,* 561

Members and stockholders. See CORPORATIONS, 5, 6, 15–17.

Officers. See DAMAGES, 8, 9.

Foreign corporations: Contracts: Validity: Statutory inhibitions.

8. A conditional contract of sale of property located in Wisconsin, made in Wisconsin on behalf of an unlicensed foreign corporation by its resident agent, followed by change of possession and partial payment, is void in behalf of the unlicensed corporation, but enforceable against it. *Duluth Music Co. v. Clancy,* 189
9. In such case the seller cannot assert that no contract ever existed and retake the goods in replevin without tendering a return of what has been received. *Ibid.*

A limit, beyond which the legislature cannot go in declaring one party to an illegal contract bound and the other free, is

not reached or passed where such provision is an additional penalty for violation of law, or where the lawbreaking party seeks to assert the invalidity of the contract and recover back its property without returning the consideration received. *Ibid.*

11. Where a foreign corporation had not complied with the requirements of sec. 1770*b*, Stats. (1898), as amended by ch. 506, Laws of 1905, findings of the trial court that its contract was made in Wisconsin and affected its personal liability, supported by sufficient evidence, must be affirmed, regardless of whether the corporation was or was not transacting business in this state within the meaning of subd. 2, sec. 1, of the amendment of 1905. *Southwestern Slate Co. v. Stephens,* 616

12. Contracts inhibited by subd. 10, sec. 1, ch. 506, Laws of 1905, are not limited to those made by a foreign corporation doing business in this state within the meaning of subd. 2 of that section. *Ibid.*

13. An offer by a foreign corporation to sell its stock and sell it in Wisconsin, when accepted by a subscriber residing in Wisconsin, completes a contract, and such contract is made in Wisconsin. *Ibid.*

14. A single contract falls within the ban of the statutes, when made by a foreign corporation which has failed to comply with the requirements of sec. 1770*b*, Stats. (1898), as amended by ch. 506, Laws of 1905. *Ibid.*

15. A contract by a foreign corporation for the sale of its unsold capital stock to a subscriber affects the personal liability of the corporation within sec. 1770*b*, Stats. (1898), as amended by ch. 506, Laws of 1905, and is void. *Ibid.*

16. A sale of shares of a corporation is really the sale of a fractional interest in the corporation, and where made by a foreign corporation to a resident of Wisconsin involves no question of interstate commerce. *Ibid.*

17. Ch. 506, Laws of 1905, does not amend the law as it then existed so as to relieve all foreign corporations that do not have a portion of their capital stock invested in Wisconsin from complying with the statutes. *Ibid.*

CORROBORATION. See WITNESSES, 8.

COSTS.

Nature, grounds, and extent of right. See APPEAL, 26–30. EJECTMENT, 5.

1. The allowance of costs on the withdrawal by plaintiff of one cause of action is within the discretion of the trial court. *Franck v. Stout,* 223

Items.

2. Items of a bill of costs, stated in the opinion, are *held* "necessary entries, pleadings and proceedings in an action according to the practice of the court," within sec. 2921, Stats. (1898), and properly allowed. *Gould v. Merrill R. & L. Co.* 433

COUNTERCLAIM. See DIVORCE, 1. PLEADING, 10.

COUNTY COURT. See EXECUTORS AND ADMINISTRATORS. INSANE PERSONS. TAXATION, 12, 20.

COURTS.

Jurisdiction. See INSANE PERSONS. MUNICIPAL CORPORATIONS, 11–14.

Supreme court. See APPEAL. MANDAMUS, 1, 2.

Circuit courts. See INSANE PERSONS. MUNICIPAL CORPORATIONS, 13, 14.

County courts. See EXECUTORS AND ADMINISTRATORS. INSANE PERSONS. TAXATION, 12, 20.

Municipal courts. See MANDAMUS.

Terms of court: Preservation of exceptions.

1. A proceeding in the determination of an action, the trial of which was commenced at a regular term, had at a special term before the termination of such regular term, is had at or during the regular term. *American States S. Co. v. Milwaukee N. R. Co.* 199
2. Exceptions to instructions to the jury made and presented for consideration of the trial court at a special term then pending, the regular term at which the trial took place being also pending, is an efficient preservation of the exceptions, although they did not formally reach the clerk of the court for the trial county until after the trial term. Presentation at the special term within the regular term satisfies the statute. *Ibid.*

CREDIBILITY. See WITNESSES, 8.

CRIMINAL LAW AND PRACTICE.

Nature and elements of crime. See ASSAULT AND BATTERY, 7. BURGLARY. EMBEZZLEMENT, 1.

Trial: Preliminary proceedings. See CONTINUANCE, 4, 5.

Same: Attendance of witnesses. See WITNESSES, 1–3.

Same: Reception of evidence. See CRIMINAL LAW, 1. HOMICIDE, 5.

Same: Other offenses: Former convictions.

1. Where former convictions and sentences, as permitted by secs. 4736–4738, Stats. (1898), are alleged in the information and the accused admits their truth on the trial, it is prejudicial error to admit evidence thereof and permit comment thereon to the jury. *Howard v. State,* 529

Same: Acts and declarations of conspirators and codefendants.

2. In case of the commission of an offense by two or more persons concerting together to that end by prearrangement, a declaration of one after the fact of an incriminating character, is not admissible as evidence against the other, or others, but such a declaration after the formed, and before the consummation of the, purpose, may be so received. *Miller v. State,* 57
3. If on the trial of a criminal action it is claimed the offense was committed in consummation of a conspiracy, an incriminating declaration of one member of the conspiracy is not admissible against the other, unless evidence is produced sufficient, in the judgment of the court, to warrant the jury in finding the existence of the conspiracy beyond a reasonable doubt. *Ibid.*
4. Where the common design to commit a criminal offense is at an end, whether by accomplishment or abandonment, no one of the conspirators is permitted, by any subsequent act or declaration of his own, to affect the others. *Ibid.*

Same: Instructions to jury. See ASSAULT AND BATTERY, 2–6. EMBEZZLEMENT. HOMICIDE.

Same: Presumption of innocence.

5. The rule as to the legal presumption of innocence excludes the idea that a mere criminal charge is evidence of guilt, rendering instruction as to the latter unnecessary, if such rule is plainly given. *Miller v. State,* 57

Same: Reasonable doubt.

6. Refusals to instruct on the subject of reasonable doubt, whether of an explanatory nature or not, do not constitute error, if the subject is covered by a proper statement of the rule in the general charge. *Miller v. State,* 57

7. It is proper to instruct a jury that, if they believe from the evidence beyond a reasonable doubt that the accused is guilty of some offense of criminal homicide within the charge made against him but entertain a reasonable doubt as between a lower and higher degree, they should convict of the lower, rather than of the higher, if satisfied beyond a reasonable doubt from the evidence that he is guilty at least of such lower. *Ibid.*

8. If one has a doubt which would cause an ordinarily prudent man to pause and hesitate to act in the most important affairs of life, he has a "reasonable doubt" within the meaning of that term, as used in the law. *Ibid.*

9. Guilt is proven beyond a reasonable doubt when all the evidence in the case, clearly, impartially, and reasonably considered, is sufficient to impress the judgment of ordinary reasonable and prudent men with a conviction upon which they would act, without hesitation, in the most important affairs of life. *Ibid.*

Same: Motion for new trial and in arrest: Appeal and error: Review.

10. Where upon review of the conviction of a person for a criminal offense, it appears that there was no evidence, in any reasonable view of it, warranting the belief of guilt to a moral certainty, and there was a motion to discharge on that ground, the judgment should be reversed and the cause remanded with directions to grant the motion. *Miller v. State,* 57

11. The common-law motion in arrest of judgment in a criminal case, with the ancient practice and technicalities in respect thereto, does not exist under the Code. That as to practice covers the subject of criminal as well as of civil trials. *Ibid.*

12. A motion, after conviction, to discharge for any ground good at common law in support of a motion in arrest of judgment, or to stay the entry of the judgment for any legitimate cause, may be called a motion in arrest of judgment, but it does not, necessarily, waive the right to move for a new trial, and in case of both motions being made, the order thereof or the deciding of the same is immaterial, so long as the decision on the motion for a new trial precedes the entry of judgment. *Ibid.*

Certified questions.

13. In order to answer a question of law in compliance with the calls of sec. 4721, Stats. (1898), it is necessary that the facts upon which that question rests should be resolved by the trial court and certified; not the evidence, but the ultimate facts, and all

of them that are material to determination of the question. *State v. Heiden,* 519

14. Failure to so certify the facts precludes the supreme court from giving answer to the question. *Ibid.*

15. For the purpose of invoking answers to questions certified under sec. 4721, Stats. (1898), each question should be a distinct proposition of law and a question of law only, not a question of fact, or of mixed law and fact. *Ibid.*

16. A question certified under sec. 4721, Stats. (1898), inquiring whether the court committed error in refusing three enumerated instructions requested by the defendant, cannot be answered categorically where the answers must differ with the requests, and is in disobedience of the singularity and concreteness of interrogation required. *Ibid.*

Review: Reversal of judgment.

17. Where an accused was found guilty and sentenced upon an information that charged no offense in the law, the sentence and judgment will be reversed. *Howard v. State,* 529

CROSS-EXAMINATION. See APPEAL, 21. EVIDENCE, 11. TRIAL, 13. WITNESSES, 7.

DAMAGES.

Grounds and subjects of compensatory damages. See CONTRACTS, 13. PLEADING, 7. RAILROADS, 15.

1. Damages based on sexual impotence and the evidence to support such damages will be closely scrutinized by the supreme court and limited within proper bounds. *Bucher v. Wis. Cent. R. Co.* 597

Same: Future or prospective damages. See ASSAULT AND BATTERY, 6.

Same: Mitigation. See LIBEL AND SLANDER, 2, 5–12.

Measure of damages. See EMINENT DOMAIN, 3–7. LANDLORD AND TENANT, 1.

2. Where defendants sold houses to plaintiff, agreeing to keep them rented at a given sum for a definite period, and thereafter abandoned the contract, plaintiff, on obtaining the best rental possible, is entitled to recover the difference as damages. *Williams v. Arnold,* 177

3. Where, in addition to evidence tending to show a depreciation in value of a horse by reason of an injury sustained, the plaintiff offered evidence of the value of its use over and above the cost of keeping, an instruction, stated in the opinion, is *held* not to authorize duplication of damages. *Gould v. Merrill R. & L. Co.* 433

4. Where there is a recovery of the full value of a horse there can be no additional recovery for loss of use of the horse. *Ibid.*

Same: Statutory limitation.

5. Where at the time of a negligent injury causing death the damages recoverable were limited by statute to $5,000, the amendment of that statute before the trial, increasing the limit to $10,000, does not increase the amount of damages recoverable. *Keeley v. Great Northern R. Co.* 448

6. Ch. 581, Laws of 1907, increasing the amount recoverable for death caused by negligence, creates a new right and does not

merely change the remedy, and is not applicable to prior transactions. *Ibid.*

Same: Instructions to jury.

7. In a personal injury case an instruction to the jury as to assessing damages, stated in the opinion, is *held* not necessarily prejudicial. *Sufferling v. Heyl & Patterson,* 510

Exemplary or punitory damages. See ASSAULT AND BATTERY, 1, 4, 5.

[8. Whether or not the rule that exemplary damages cannot be recovered against the principal for acts of the agent neither authorized nor ratified by the principal should be applied where the malicious act is done by the officer of a corporation intrusted with the management of its business, not determined.] *Pfister v. Milwaukee Free Press Co.* 627

9. The character of the authority given in the first instance to the managing editor of a newspaper, owned by a corporation, publishing a libelous article, together with the subsequent conduct of the corporation, may be sufficient to support a finding that the malice of which the managing editor was guilty was also attributable to the corporation, *Ibid.*

Same: Instructions to jury.

10. A charge to the jury on the question of exemplary damages which omits to include all the elements upon which such damages are found or awarded is not prejudicial where there is no request for instructions covering the omitted elements. *Thomas v. Williams,* 467

Excessive damages. See EMINENT DOMAIN, 3.

11. Where plaintiff recovered $15.54 more than the total amount lost by defendant's breach of contract, and an allowance of interest from the commencement of the action would exceed that sum, the damages recovered are not excessive. *Williams v. Arnold,* 177

12. Where the amount of the recovery is not such as to indicate passion or prejudice on the part of the jurors, the judgment will not be reversed on the ground of excessive damages. *Pfister v. Milwaukee Free Press Co.* 627

DEATH. See DAMAGES, 5, 6.

DEATH CERTIFICATE. See EVIDENCE, 3, 4.

DEBTOR AND CREDITOR. See BILLS AND NOTES. BROKERS, 5. EXECUTORS AND ADMINISTRATORS, 1–3. MORTGAGES. NOVATION. PARENT AND CHILD.

DECLARATIONS. See CRIMINAL LAW, 2–4.

DEEDS.

Delivery.

The delivery of a deed to a third person, with instructions to give it to the grantee after the grantor's death, is a valid delivery, if it was the grantor's intention to presently pass the title. *Klabunde v. Casper,* 491

Construction and operation. See ADVERSE POSSESSION, 2, 4–8, 11, 12, 23–25.

DEFICIENCY JUDGMENT. See MORTGAGES, 3–7.

DELIVERY. See COMMERCE. DEEDS.

DEMAND. See EMBEZZLEMENT, 1, 4.

DEMURRER. See CONTRACTS, 6. PLEADING, 2–4, 8, 10.

DEVOLUTION OF PROPERTY. See CONSTITUTIONAL LAW, 1, 13. TAXATION, 13.

DISCOVERY. See TRIAL, 18.

DISCRETION. See CONTINUANCE, 2–5. COSTS, 1. EJECTMENT, 4. TRIAL, 3, 4, 21.

DISCRIMINATION. See CONSTITUTIONAL LAW, 6–12.

DISSEISIN. See ADVERSE POSSESSION, 2–12, 17, 19.

DISSOLUTION. See PARTNERSHIP, 2–5.

DIVORCE.

1. An adverse judgment in an action by the wife for divorce is a bar to a counterclaim on the same grounds interposed in a subsequent action to a complaint by the husband for divorce for desertion. *Patrick v. Patrick*, 463
2. A judgment, in an action by the wife for divorce, that the husband was not guilty of cruel and inhuman treatment and failure to support, is not conclusive that the wife was living apart without cause, so as to entitle the husband in a subsequent action to a divorce on the ground of desertion. *Ibid.*
3. A general denial puts in issue desertion by the wife charged in a complaint for divorce, and renders admissible evidence tending to show a voluntary separation and living apart. *Ibid.*

DUPLICATION OF DAMAGES. See DAMAGES, 3, 4.

DUPLICITY. See INDICTMENT AND INFORMATION.

EJECTMENT.

Right of action. See ADVERSE POSSESSION, 7.

Second trial: Undertaking: Justification of sureties.

1. Sec. 3092, Stats. (1898), does not refer to sec. 2704 (as amended by ch. 159, Laws of 1903), but to secs. 2705, 2706. *Newland v. Morris*, 113 Wis. 394, overruled. *Dickinson v. Smith*, 1
2. Where the order granting a new trial in ejectment fixed the amount of the undertaking and required the sureties to "justify their responsibility as required by law," this meant that the sureties should satisfy the trial judge in the first instance as to their responsibility, subject to being required to justify on notice as provided in sec. 2705, Stats. (1898). *Ibid.*
3. Although the sureties in such case failed to state, in their affidavit appended to the undertaking, that the property possessed by each was "over and above all his debts and liabilities," yet when the undertaking was approved by the trial judge the justification was sufficient under sec. 3092, Stats. (1898), subject only to further justification on notice under sec. 2705. *Ibid.*
4. Under sec. 2831, Stats. (1898), the court may, in discretion, permit a defective undertaking given under sec. 3092 to be amended, even after the expiration of the year within which the right to a new trial must be exercised. *Ibid.*

Same: Payment of costs.

5. An order vacating the judgment and granting a new trial in ejectment should not be set aside because of failure of the ap-

plicant to pay costs awarded on affirmance of the judgment, where it appeared that the other party had neglected to have such costs taxed. The order should be modified in such case by making the new trial conditional upon payment of such costs within a reasonable time after they should be taxed, treating the time for payment as thus extended under sec. 2831, Stats. (1898). *Dickinson v. Smith*, 1

EMBEZZLEMENT.

Nature of offense.

1. Where the crime of embezzlement is committed no demand is necessary, and no response to such demand by actual payment absolves the offender from the already complete guilt. *State v. Heiden*, 519
2. Where the proof was identically the same and of equal credibility with reference to the charges contained in two counts of an indictment each charging embezzlement, a verdict of guilty on the first count, without any finding as to the second count, does not upon its face appear repugnant, inconsistent, perverse, or the result of compromise, at least in the absence of the instructions under which the jury were proceeding. *Ibid.*

Pleading. See INDICTMENT AND INFORMATION.

Instructions to jury.

3. In a prosecution for embezzlement a requested instruction, stated in the opinion, was properly refused where the uncontradicted evidence authorized the jury to find that at various stages the defendant might have formed the intent to appropriate the money. *State v. Heiden*, 519
4. For like reasons a requested instruction that the defendant would not be guilty until a demand or reasonable time after his employment had ceased had expired, unless at the time he received the money he formed the intention to take it, is properly refused. *Ibid.*

EMINENT DOMAIN.

Injunction before entry.

1. Where a railroad company, acting under an invalid proceeding to condemn land for a right of way, had made no entry nor erected any structure on the land, but threatened to enter and construct a track, the owner is entitled to an injunction restraining the company from entering the land without first making compensation, and it is therefore error to dissolve a temporary restraining order on condition that the company secure the owner for the damages resulting from the entry and construction of the road. *McCord v. Eastern R. Co.* 136 Wis. 254, followed. *Lundberg v. Eastern R. Co.* 161

Compensation: Persons entitled. See WITNESSES, 4, 5.

2. One may purchase or improve real estate in anticipation of and regardless of any probability of part or all of it being subsequently appropriated for public purposes. To do so is not evidence of bad faith. *Krier v. Milwaukee Northern R. Co.* 207

Same: Measure and amount.

3. In condemnation proceedings, evidence stated in the opinion is held to justify a refusal to set aside a verdict as excessive. *Krier v. Milwaukee Northern R. Co.* 207

Instructions to jury: Value of premises.

4. In condemnation of lands for railroad right of way it is not error to instruct the jury to value the strip taken as part and parcel of the entire tract of which it formed a part. *American States S. Co. v. Milwaukee N. R. Co.* 199

5. In condemnation of lands for a railroad right of way it is not error to instruct the jury as stated in the opinion as to the measure of damages to the part not taken. *Ibid.*

6. It is not error to instruct the jury in proceedings to condemn land that the fair market value is the "full fair market value" and such sum as the property is worth to persons generally who would pay its "just and full value." *Ibid.*

7. In condemnation of land for a railroad right of way, error, if any, in admitting evidence as to the value of the strip taken as if the value of the improvements located on the lands not taken was distributed proportionally acre by acre over the whole tract is cured by instructions that the limit of recovery is the difference between the fair market value of the whole land as it existed at the time the commissioners made their award and the fair market value of what remained after the taking. *Ibid.*

Same: View of premises: Effect.

8. A jury has a right to act upon knowledge as to that which they saw on a view of the premises in dispute in determining the credibility of evidence, and instructions to that effect are not error. *American States S. Co. v. Milwaukee N. R. Co.* 199

Same: General and special benefits.

9. In condemnation of land for a railroad, it is proper to explain to the jury the distinction between special and general benefits, and that the former, but not the latter, are to be considered in reduction of the measure of depreciation in fair market value. *American States S. Co. v. Milwaukee N. R. Co.* 199

Same: Sales of other property.

10. On the question of value, where lands in the vicinity are sufficiently similar in character to the lands in question and the time of their sale is sufficiently near that with reference to which the value of the land in question is to be fixed and all circumstances of the two situations are sufficiently similar, and, in the judgment of the trial judge, comparison will afford aid to the jury in solving the issue of value, evidence of the selling price of such other lands is admissible. *American States S. Co. v. Milwaukee N. R. Co.* 199

11. The offer of such evidence presents a primary question of competency, and the ruling thereon cannot be disturbed on appeal unless manifestly wrong. *Ibid.*

EMPLOYEES. See MASTER AND SERVANT. RAILROADS.

ENTIRE CONTRACTS. See CONTRACTS, 1, 2.

EQUAL PROTECTION OF LAWS. See CONSTITUTIONAL LAW, 9.

EQUITABLE ESTOPPEL. See ADVERSE POSSESSION, 10.

EQUITY: Laches. See TRADE-MARKS, 17.

ESCROW. See CONTRACTS, 9.

ESTATES OF DECEDENTS. See EXECUTORS AND ADMINISTRATORS. WILLS.

ESTOPPEL. See ADVERSE POSSESSION, 10. CONTRACTS, 4.

EVIDENCE.

Presumptions. See BILLS AND NOTES, 4. CRIMINAL LAW, 5.

Burden of proof. See LIBEL AND SLANDER, 7. SCHOOLS AND SCHOOL DISTRICTS, 3, 4. TRIAL, 8, 9, 19.

1. Material facts in issue in a civil case, in order to be found in favor of the party upon whom the burden of proof rests, must be established to the satisfaction of the jury by a preponderance of the evidence to a reasonable certainty. *Sufferling v. Heyl & Patterson,* 510

Prima facie evidence. See EVIDENCE, 4.

Admissions. See PLEADING, 11, 12.

2. Where an amended pleading has been substituted for the original, the latter may be put in evidence as an admission of the party. *Schoette v. Drake,* 18

Declarations. See CRIMINAL LAW, 2–4.

Documentary evidence: Public or official acts: Death certificate.

3. A death certificate made by a physician according to the requirements of secs. 1024, 1024*a*, Stats. (1898), is a public record, and its contents are not privileged. *State v. Pabst,* 561
4. Such certificate is admissible as a public record within the calls of sec. 4160, Stats. (1898), as *prima facie* evidence of the material facts stated therein. *Rohloff v. Aid Asso.* 130 Wis. 61, distinguished. *Ibid.*

Same: Books of account.

5. The making of entries in books of account whenever reported as paid or received is a substantial compliance with the rule that they should be made at the time of the transaction to make the books competent evidence. *Lemma v. Blanding,* 156

Parol or extrinsic evidence affecting writings. See REPLEVIN, 2.

6. Where parol evidence was offered to show an agreement, the decision of the trial court on the preliminary question as to whether such agreement was reduced to writing has the weight of an ordinary finding of fact, not to be disturbed unless contrary to a clear preponderance of the evidence. *Illinois Steel Co. v. Paczocha,* 23
7. A mere receipt for money, or a mere conveyance which is unilateral and does not attempt to state the whole agreement made, does not exclude parol evidence as to other terms thereof. *Ibid.*
8. The admission of parol evidence as to a conveyance or release to defendant by a person claiming some interest in the land in suit, is *held* not a prejudicial error where, at the time of such conveyance, defendant had been in complete possession of the land for some time and his right did not rest upon the conveyance but upon privity of possession with his predecessors in occupancy. *Ibid.*

Opinion evidence: Conclusions and opinions of witnesses. See APPEAL, 11–14.

9. It is improper for a medical expert who did not see the patient until five months after an alleged injury to the head, and who had no certain or satisfactory data upon which to base an opinion of sexual impotence as the result of the injury, to testify as to the possible consequences of impotence. *Bucher v. Wis. Cent. R. Co.* 597

10. In an action for personal injuries, testimony of medical experts that such conditions as they observed might have produced the injury alleged merely affirms that the injury was in their opinion sufficient to have produced the condition complained of, not that it did produce it. *Ibid.*

Same: Competency of experts.

11. Where an examination goes far enough to qualify osteopaths as medical experts for some general purposes relevant to the cause on trial and covering to a considerable extent questions objected to, error cannot be assigned because plaintiff did not show the witnesses had any knowledge from actual experience in similar cases, in the absence of cross-examination to bring out such facts. *Bucher v. Wis. Cent. R. Co.* 597

Same: Effect of opinion evidence.

12. Where the general unreliability of expert testimony is accentuated by a showing that the expert has little or no data upon which to base an opinion, that the subject upon which he expresses an opinion is one of great doubt and difficulty, and he demonstrates his lack of knowledge by his testimony, his opinion is insufficient to support a verdict seemingly unjust or excessive. *Bucher v. Wis. Cent. R. Co.* 597

Weight and sufficiency. See ADVERSE POSSESSION, 13, 21. ASSAULT AND BATTERY, 1. EMINENT DOMAIN, 8. REPLEVIN, 2.

EXCEPTIONS. See APPEAL, 1–3. COURTS, 2.

EXCESSIVE DAMAGES. See DAMAGES, 11, 12. EMINENT DOMAIN, 8.

EXCISE TAXES. See CONSTITUTIONAL LAW, 1, 2, 4–6, 9.

EXECUTORS AND ADMINISTRATORS.

Allowance of claims: Services rendered decedent: Evidence.

1. Where the evidence of the value of services rendered a decedent varies, although no evidence as to value is offered in behalf of the estate, the court is not thereby precluded from adopting the figures of witnesses who testified to the lowest scale of wages, and such finding is one supported by evidence and is not contrary to the uncontradicted evidence. *Heber v. Estate of Heber,* 472

2. In the absence of a contract whereby a decedent agreed to pay his son for his services, a conveyance of land by the father to the son would be considered a gift; but the existence of a contract, together with the fact that at the time of the conveyance the decedent was largely in debt for such services, and the absence of evidence of payments otherwise made on such indebtedness, furnishes evidence sufficient to support a finding offsetting the value of the land against the son's services. *Ibid.*

3. Under the provisions of sec. 2829, Stats. (1898), error, if any, in allowing the value of land conveyed by the decedent to the claimant to be offset against the claim must be regarded as immaterial, where that issue, though not pleaded, was fully litigated. *Ibid.*

Sales under order of court: Rights of heirs.

4. Where an administrator, after selling his decedent's homestead pursuant to order of court, in his final account treated a note given by the purchaser as cash, after more than twenty years

the heirs of the decedent cannot recover from the purchaser on the note, although the administrator has never collected or attempted to collect it. *Steinberg v. Salzman*, 118

[5. In such case, the administrator not being before the court, no opinion is expressed as to his liability to account.] *Ibid.*

Actions. See TROVER AND CONVERSION, 1.

6. Courts should not deny to personal representatives of deceased persons the ordinary remedies that are open to other suitors. *Heber v. Estate of Heber*, 472

Assignment of estate. See WILLS, 6.

EXECUTORY CONTRACTS. See MUNICIPAL CORPORATIONS, 15–17.

EXEMPLARY DAMAGES. See ASSAULT AND BATTERY, 1, 4, 5. DAMAGES, 8–10.

EXPERT TESTIMONY. See APPEAL, 11–14. EVIDENCE, 9–12. WITNESSES, 1–3.

FALSE IMPRISONMENT.

1. In an action for false imprisonment, in which defendants alleged justification of plaintiff's arrest on the ground that he was drunk and disorderly, the questions whether plaintiff was, at the time of the arrest, violating any law or ordinance, and whether there was unreasonable delay in bringing him before a magistrate, are for the jury. *Schoette v. Drake*, 18

2. Where an officer makes an arrest without a warrant, it is his duty to take the person arrested before a magistrate without unreasonable delay. *Ibid.*

3. In an action for false imprisonment the criminal complaint is admissible in evidence as bearing upon the credibility of the evidence of the defendants and the cause of the arrest. *Ibid.*

4. Upon the question whether a person was drunk and disorderly at about 5 o'clock p. m. so as to justify his arrest at that time, evidence that during most of the day he had been in saloons, drinking and at times noisy, boisterous, and quarrelsome, was admissible. *Ibid.*

FEES. See WITNESSES, 1–3.

FELLOW-SERVANTS. See MASTER AND SERVANT, 13–15, 17. RAILROADS, 6, 11.

FINDINGS OF FACT. See APPEAL, 1, 6–14, 17. CORPORATIONS, 7, 11. EXECUTORS AND ADMINISTRATORS, 1, 2. GIFTS, 3. MASTER AND SERVANT, 7. STREET RAILWAYS, 7. TAX TITLES, 1.

FORECLOSURE. See MORTGAGES, 2–7. STREET RAILWAYS, 4.

FOREIGN CORPORATIONS. See CORPORATIONS, 8–17.

FOREIGN STATUTES. See TAXATION, 11.

FORMER CONVICTION. See CRIMINAL LAW, 1.

FRAUD. See ADVERSE POSSESSION, 23, 24, 26. CONTRACTS, 10. RELEASE. TRADE-MARKS, 15.

FRAUDS, STATUTE OF. See CONTRACTS, 9.

GIFTS.

Inter vivos. See EXECUTORS AND ADMINISTRATORS, 2.

1. Evidence that A. never gave or intended to give B. a note and mortgage taken in B.'s name, that B. never knew of the exe-

cution thereof, and that there was no acceptance thereof on the part of B., is insufficient to establish a gift from A. to B. *Tobin v. Tobin,* 494

In contemplation of death.

2. The words "in contemplation of death" as used in ch. 44, Laws of 1903, refer to an expectation of death which arises from such a bodily or mental condition as prompts disposal of property and bestowal upon those regarded as entitled to the bounty and includes gifts *inter vivos* as well as *causa mortis.* *State v. Pabst,* 561

3. Evidentiary facts, for which see opinion, warrant a finding that a deed of trust executed about six months before the grantor's death was made in contemplation of death. *Ibid.*

GINSENG. See TAXATION, 3.

GOOD FAITH. See ADVERSE POSSESSION, 23, 24. BROKERS, 1, 3. EMINENT DOMAIN, 2.

GOOD WILL. See PARTNERSHIP, 3, 4.

GRAND JURY. See LIBEL AND SLANDER, 16.

GREAT LAKES. See MUNICIPAL CORPORATIONS, 2, 3. NAVIGABLE WATERS, 6.

GROSS NEGLIGENCE. See NEGLIGENCE, 13, 14.

GROWING CROPS. See TAXATION, 3, 4.

GUARDIAN AND WARD. See ADVERSE POSSESSION, 23. INSANE PERSONS, 1.

HARBORS. See MUNICIPAL CORPORATIONS, 1. NAVIGABLE WATERS, 1–5.

HOMESTEAD. See ADVERSE POSSESSION, 25. EXECUTORS AND ADMINISTRATORS, 4.

HOMICIDE.

Self-defense.

1. The common-law rule as to duty of one attacked to "retreat to the wall" or so far as he can, or so far that to go further would rather increase than decrease the danger,—the "flight rule,"—is no longer the law. *Miller v. State,* 57

2. If a person is attacked by another, without that other's fault, and such person has reasonable ground to apprehend he is in imminent danger of losing his life or receiving some bodily injury at the hands of such other, he is justified in acting upon such reasonable apprehension, regardless of the real facts, doing whatever to him at the time seems reasonably necessary for his efficient protection, even to taking the life of his adversary. *Ibid.*

3. In a prosecution for an alleged criminal homicide, a wrong instruction on the subject of self-defense does not constitute error, harmful to the accused, if in no reasonable view of the evidence could the claimed right to slay in self-defense be sustained. *Ibid.*

4. If a person is assaulted on another's premises by the latter and a serious affray results, terminating in the party assaulted leaving such premises, being commanded to do so and not to return, such occurrence does not militate against such other's right of self-defense, in case of such person returning and, without justification by the conduct of such other, creating in the

mind of such other reasonable apprehension of being presently killed or receiving some serious bodily injury. *Ibid.*

Trial: Codefendants: Concert of action: Conviction or acquittal?

5. Where two persons are charged with being guilty of having committed an offense of criminal homicide of the first magnitude, and the claim of the prosecution is that they acted to that end and pursuant to agreement, and there is evidence tending to establish that situation, yet there is room in the evidence for believing, reasonably, that one of the parties did not participate in the design to kill or in anything more than to punish, the guilt of the other of the highest offense does not require that one to be so convicted or acquitted. *Miller v. State,* 57

ILLEGAL CONTRACTS. See CORPORATIONS, 8–17.

IMPEACHMENT. See WITNESSES, 8.

IMPLIED CONTRACTS. See WITNESSES, 1.

IMPOTENCE. See APPEAL, 11. DAMAGES, 1. EVIDENCE, 9.

IMPRISONMENT. See FALSE IMPRISONMENT.

IMPROVEMENTS. See MUNICIPAL CORPORATIONS, 15–22.

INDICTMENT AND INFORMATION.

Duplicity.

1. It is only when it appears by the indictment itself that two or more distinct acts are involved in the commission of two or more crimes charged that an indictment or a count therein charging two or more offenses is bad for duplicity. *State v. Heiden,* 519
2. An indictment for embezzlement alleging in one count that defendant embezzled a note and the proceeds of two other notes is not bad for duplicity. *Ibid.*

INDORSEMENT. See BILLS AND NOTES, 3–5.

INFANTS. See ADVERSE POSSESSION, 23.

INFRINGEMENT. See TRADE-MARKS, 14–17.

INHERITANCE of property. See CONSTITUTIONAL LAW, 13.

INHERITANCE TAX. See CONSTITUTIONAL LAW, 1, 5–13. CORPORATIONS, 7. TAXATION, 11–20.

INJUNCTION. See EMINENT DOMAIN, 1. MUNICIPAL CORPORATIONS, 16, 17. NAVIGABLE WATERS, 4, 5. TAXATION, 6. TRADE-MARKS, 15, 16.

INNUENDO. See LIBEL AND SLANDER, 1, 13.

INSANE PERSONS.

Claims for maintenance: Jurisdiction of circuit court.

1. A county court, having appointed a guardian of an insane person, who has qualified and is acting as such, has jurisdiction to adjudicate claims for the support and maintenance of the ward, and it is not error for the circuit court to refuse to exercise original jurisdiction in such matters. *Washington County v. Schrupp,* 219
2. Sec. 600, Stats. (1898), does not authorize the bringing of an original action in the circuit court to enforce claims for the support and maintenance of insane persons, nor provide an

independent remedy by action in the circuit court, to the exclusion of the jurisdiction of the county court in such matters. *Ibid.*

INSTRUCTIONS TO JURY.

1. While trial judges may exercise discretion, it is better to follow approved phrasing of important rules. *Miller v. State,* 57
2. Trial judges may incorporate approved requests in the general charge, so as to cover every phase of the case requested by counsel to be given. *Ibid.*
3. An instruction so involved as to fail to impress the minds of the jury one way or the other may be disregarded. *Ibid.*
4. A suggestion in the charge not warranted by the evidence is harmful error. *Ibid.*
5. The use of the adjective form instead of the adverbial form to qualify or modify the adjective "prudent," is not necessarily ground for reversal. *Gould v. Merrill R. & L. Co.* 433
6. In action for assault and battery, under the facts, *held* not error to instruct relative to self-defense. *Thomas v. Williams,* 467
7. In absence of request, not error to omit to define "malice" although court used the word "maliciously" several times. *Ibid.*
8. Instruction on the subject of exemplary damages *held* not prejudicial. *Ibid.*
9. Instruction given *held* not to authorize awarding prospective damages. *Ibid.*
10. Instructions as to where the burden of proof rests *held* not erroneous, although the jury are thereby informed as to effect of answers to questions of special verdict. *Illinois Steel Co. v. Paczocha,* 23
11. Instruction as to burden of proof upon an immaterial question harmless. *Ibid.*
12. Instructions as to rejection of testimony of witness believed to have testified falsely, *held* erroneous. *Steber v. Chicago & N. W. R. Co.* 10
13. Instructions given as to assessing damages *held* not necessarily prejudicial. *Sufferling v. Heyl & Patterson,* 510
14. Requested instructions on the law of embezzlement *held* properly refused. *State v. Heiden,* 519
15. In condemnation of lands it is not error to instruct the jury to value the strip taken as part and parcel of the entire tract. *American States S. Co. v. Milwaukee N. R. Co.* 199
16. Instructions as to measure of damages on condemnation of lands *held* not erroneous. *Ibid.*
17. It is not error in instruction as to fair market value to use the phrases "full fair market value" and "just and full value." *Ibid.*
18. Not error to instruct that jury may act upon knowledge as to that which they saw on view of premises in dispute. *Ibid.*
19. In condemnation proceedings it is proper to explain that special benefits, and not general benefits, are to be considered in reduction of the measure of depreciation in fair market value. *Ibid.*

20. Instructions as to exemplary damages *held* not prejudicial in the absence of request for instructions covering omitted elements. *Thomas v. Williams*, 467

21. Instructions as to essentials of libel and defense of justification *held* not to be erroneous. *Pfister v. Milwaukee Free Press Co.* 627

22. Instructions as to liability of master *held* so significantly in his favor as to be harmless. *Sufferling v. Heyl & Patterson*, 510

23. Instructions in action for death of a switch foreman *held* not prejudicial. *Keeley v. Great Northern R. Co.* 448

24. Instructions as to measure of damages for death of plaintiff's husband *held* not erroneous. *Ibid.*

25. Instructions as to ordinary care *held* harmlessly inaccurate. *Sufferling v. Heyl & Patterson*, 510

26. Unnecessary to instruct that a mere criminal charge is not evidence of guilt if the rule as to legal presumption of innocence is plainly given. *Miller v. State*, 57

27. Refusal to instruct, and instructions given on the subject of reasonable doubt, *held* free from error. *Ibid.*

28. Instructions as to admission by witness of having made contradictory statements under oath *held* not to have misled the jury. *Jirachek v. Milwaukee E. R. & L. Co.* 505

29. Failure to give instructions not error in absence of request in that behalf. *Illinois Steel Co. v. Paczocha*, 23

30. Refusal to give correct requested instructions not error where fairly included in charge. *Gould v. Merrill R. & L. Co.* 433; *Jirachek v. Milwaukee E. R. & L. Co.* 505

31. Not error to refuse requested instruction which is without basis in the evidence. *Smith v. Goldberg*, 423; *Jirachek v. Milwaukee E. R. & L. Co.* 505

INTEREST. See PARTNERSHIP, 5.

INTERSTATE COMMERCE. See COMMERCE. CORPORATIONS, 16.

INVENTION. See TRADE-MARKS, 6.

JOINDER of causes of action. See ACTION, 2.

JOINT TORTFEASORS. See PARTIES.

JUDGMENT.
Deficiency judgment. See MORTGAGES, 3–7.
Opening or vacating. See EJECTMENT, 5. MORTGAGES, 7. NEW TRIAL, 3.
Modification. See APPEAL, 24, 25.
Conclusiveness of adjudication. See DIVORCE, 1, 2. MORTGAGES, 6. TAXATION, 20.

JURISDICTION. See INSANE PERSONS. MANDAMUS, 1, 2. MUNICIPAL CORPORATIONS, 11–14.

JURY. See APPEAL, 19, 20.

JUSTIFICATION.
Of arrest. See FALSE IMPRISONMENT, 1, 4.
Of libel. See LIBEL AND SLANDER, 5–12, 18.
Of sureties. See EJECTMENT, 1–4.

LACHES. See TRADE-MARKS, 17.

LAKE MICHIGAN. See MUNICIPAL CORPORATIONS, 2, 3. NAVIGABLE WATERS, 6.

LANDLORD AND TENANT.

Breach of agreement to insure: Damages.

1. On breach by the lessee of a contract to keep the premises insured for a specified amount, the measure of damages is the loss sustained by the lessor, not exceeding the amount agreed upon. *Franck v. Stout,* 223
2. When a lessee fails to keep the premises insured according to contract, it is not the duty of the lessor, in order to minimize the loss, to procure the insurance and charge the premium to the lessee, unless the lessee has refused to procure insurance. The mere fact that he allowed a policy to be canceled is not sufficient. *Ibid.*
3. In an action by a lessor against the lessee for breach of a contract to keep the premises insured, evidence of financial aid rendered the lessor by the lessee during the term is irrelevant and raises collateral issues. *Ibid.*

Conveyance by tenant. See ADVERSE POSSESSION, 2–12.

Surrender of possession. See ADVERSE POSSESSION, 2, 4–12.

LIBEL AND SLANDER.

Innuendo.

1. The office of innuendo is to explain, not to enlarge, the meaning of alleged libelous words. *Pfister v. Milwaukee Free Press Co.* 627

Privileged communications.

2. Where, in an action against a newspaper company for libel, the defendant, having specifically pleaded and designated certain matters as a defense of privilege, is bound by its pleading and is not authorized thereunder to offer proof of mitigating circumstances. *Pfister v. Milwaukee Free Press Co.* 627
3. Where plaintiff had no office, was not a candidate for office, and did not belong to any class which by seeking and inviting public patronage renders itself amenable to public comment and criticism which cannot be rightly applied to a private citizen, a defense of "privilege" or "fair criticism and proper comment" is not permissible in an action for libel. *Ibid.*
4. A false and defamatory publication concerning a private citizen is not privileged merely because it may relate to some public matter. *Ibid.*

Justification and mitigation of damages.

5. Affirmative proof of mitigating circumstances cannot be given in evidence without having been specially pleaded. *Pfister v. Milwaukee Free Press Co.* 627
6. Although it seems that the defendant may show in mitigation of damages that a libelous article was copied from another newspaper and published under the belief that it was true, a plea that other articles of like tenor and effect were also published in other papers does not present that question, and it is not error to strike out such allegations of the answer. *Ibid.*
7. Where defendant has pleaded the truth as justification for an alleged libel, it is not incumbent upon the plaintiff as part of his case to negative the truth of the charges, but if he sees fit to assume that burden the defendant is not prejudiced. *Ibid.*

8. In an action for libel defendant cannot attribute some hidden meaning to the words used which the readers would not be apt to discover and then proceed to justify on the basis that such meaning is the true one. *Ibid.*

9. In libel the meaning intended by the writer is not important, unless such meaning is the natural and obvious one—the meaning that would naturally be conveyed to the readers generally. *Ibid.*

10. In an action for libel where none of the alleged libelous articles could reasonably have been understood as referring to plaintiff's connection with certain questionable transactions, evidence of public notoriety of such transactions is immaterial and inadmissible as proof of mitigation of damages. *Ibid.*

11. In libel defendant cannot mitigate damages by showing specific acts of wrongdoing on the part of plaintiff. *Ibid.*

12. In libel evidence of mitigation of damages should be confined to the general bad character of the plaintiff and to legitimate proof tending to disprove malice. *Ibid.*

Exemplary damages. See DAMAGES, 8, 9.

Trial: Reception of evidence.

13. A ruling on evidence in an action for libel that the published articles did not directly charge plaintiff with having committed a crime, but were susceptible of such meaning, and that it was for the jury to say whether or not such was their true meaning, and further that it was not permissible to aver in the answer that plaintiff was guilty of an offense different from that referred to in the complaint and then allege, by innuendo, that the language used in the published article related to the offense set out in the answer, may operate to deprive a defendant of a meritorious defense, and is disapproved. *Pfister v. Milwaukee Free Press Co.* 627

14. In such case, however, it is only when it is reasonably clear that the language used is susceptible of the meaning attributed to it in the answer and the jury may infer that it was so understood by a considerable number of the readers of the publication that proof under such pleading should be permitted. *Ibid.*

15. In an action for libel it is proper to permit the defendant to testify that he was not actuated by malice or evil intent toward the plaintiff; but it is not error to refuse to permit the examination to proceed further than to allow a direct and explicit denial of malice. *Ibid.*

16. Where an alleged libelous article consisted of a statement concerning plaintiff's indictment for alleged larceny, the testimony taken before the grand jury is not admissible to establish plaintiff's guilt, although if it were charged as libelous to say that the grand jury acted on ample evidence, such testimony would be competent to prove that it did so act. *Ibid.*

Same: Instructions to jury.

17. Where a complaint set forth libelous articles several of which did not charge a crime, it is not error to instruct the jury as stated in the opinion. *Pfister v. Milwaukee Free Press Co.* 627

18. While sec. 4021, Stats. (1898), provides that a plea of justification, though not maintained by the evidence, shall not of itself be proof of malice, where the defendant pleads the truth in

justification, it is not error to instruct the jury that an unsuccessful attempt at justification is a proper circumstance for the jury to consider in determining whether the defendant was actuated by malice. BARNES and SIEBECKER, JJ., are of the opinion that such construction of the statute is too narrow, and that a good-faith but unsuccessful attempt to justify should not be made the basis of aggravating damages, although hesitating to say that such error is of sufficient materiality to warrant a reversal. *Ibid.*

Same: Verdict.

19. Where, in an action for libel, nine causes of action were originally pleaded, three discontinued, and proof offered of the remaining six, it is not error to submit the case for a general verdict, provided the jury are properly instructed. *Pfister v. Milwaukee Free Press Co.* 627

LICENSE. See STATUTES, 2.

LIENS. See MORTGAGES. STREET RAILWAYS, 4. TAXATION, 14.

LIMITATION OF ACTIONS. See ADVERSE POSSESSION. STREET RAILWAYS, 5. TAX TITLES, 4.

LIMITATION OF DAMAGES. See DAMAGES, 5, 6.

LIS PENDENS. See TAXATION, 8.

MALICE. See ASSAULT AND BATTERY, 3. DAMAGES, 8, 9. LIBEL AND SLANDER, 15, 18.

MANDAMUS.

1. The supreme court has jurisdiction by *mandamus* to require a municipal court to exercise its rightful jurisdiction, where refusal works injury to relator. *State ex rel. Cooper v. Brazee,* 538

2. Where relators have an efficient remedy by writ of error to review a final order of a municipal court the supreme court will not exercise its extraordinary jurisdiction by *mandamus* to correct such order. *Ibid.*

[3. TIMLIN, KERWIN, and BARNES, JJ., are of the opinion that the statutory right of appeal from the district to the municipal court of Milwaukee county applies to judgments of conviction for violation of city ordinances, although the prosecution is by a civil action.] *Ibid.*

MARGINS. See BROKERS, 6, 7, 9.

MASTER AND SERVANT.

Relation: Creation and existence.

1. There is no relation of master and servant between a general contractor and the servant of his independent subcontractor. *Sufferling v. Heyl & Patterson,* 510

Liability for injuries to servant: Machinery and appliances: Guards. See RAILROADS. TRIAL, 20, 23.

2. Where a master has work by machinery performed in the usual manner and under ordinary conditions, and it is manifest that a guard or fence would not be a protection nor lessen the danger incident to the operation of the machine, no situation is presented charging the master with negligent omission to

fence or guard the machine, even assuming, but not deciding, that the situation is controlled by sec. 1636*j*, Stats. (1898). *Kuich v. Milwaukee Bag Co.* 101

3. A circular saw is not one of the parts of a machine or an appliance required to be guarded within the calls of sec. 1636*j*, Stats. (1898). *Schmitt v. Seefeld,* 459

4. Sec. 1636*jj*, Stats. (Laws of 1905, ch. 303), does not enlarge sec. 1636*j* so as to include all appliances so located as to be dangerous to laborers in the discharge of their duties. *Ibid.*

Same: Safe place to work.

5. Where a servant in performing a service wholly deviates from the customary and reasonable method of performance and adopts a course wholly outside of what is to be reasonably expected, and thereby exposes himself to hazards not incident to the reasonable and customary way of performance, the master, under his duty of furnishing a safe place to work, is not liable to him for an injury. *Schmitt v. Seefeld,* 459

6. Where a reasonably safe place to perform a service in the usual and customary way that servants may reasonably be expected to take has been furnished, the master has performed his duty, and if the servant sees fit to perform such service in a way which is not reasonably to be anticipated as one which would be adopted by any person under the circumstances, the master is not guilty of negligence. *Ibid.*

Same: Regulations governing conduct of servant. See RAILROADS, 6, 8, 11.

7. In an action by a servant against the master, where the negligence found was failure to promulgate regulations, in the absence of evidence that such failure was efficient to cause the injury a finding that such failure was the proximate cause of the injury is based only upon mere conjecture or guess and is unauthorized. *Johanson v. Webster Mfg. Co.* 181

Same: Warning and instructing servant.

8. Evidence that a servant had performed service for several months in a proper and competent manner without showing want of physical capacity or strength, and that nothing had occurred to apprise her superiors, nor did she inform them, that she was being physically overburdened or taxed to exhaustion, does not convict the master of failure to exercise ordinary care with respect to the servant in permitting her to work and in keeping her at work at the time of the injury. *Kuich v. Milwaukee Bag Co.* 101

9. A servant in feeding bags into a printing machine under such circumstances as to apprise her of danger, and who had been engaged in similar work for several months and possessed the necessary intelligence and information to understand the danger incident to her work, is not so situated that her master is required to instruct or give warning as to the danger of injury in her employment. *Ibid.*

10. The duty of a master to warn a servant of hidden dangers or those of which the servant may be supposed to be ignorant arises only where the master has some reason to believe the servant is ignorant of the danger and needs to be warned. *Johanson v. Webster Mfg. Co.* 181

11. In the case of an adult servant of apparent usual intelligence the master may assume that the servant has the knowledge common to the great mass of mankind unless informed to the contrary, and in such case is not negligent in failing to specially instruct or warn. *Ibid.*

12. A woman, qualified as stated in the opinion, is presumed to know the inflammability of benzine, and the master is not negligent in failing to warn her of the inflammability of that material. The fact that she was of foreign birth and did not speak English much does not suggest want of intelligence. *Ibid.*

Same: Fellow-servants. See MASTER AND SERVANT, 17. RAILROADS, 6, 11.

13. The servant of a general contractor and those of his independent subcontractor, all being engaged in executing a particular enterprise, are not fellow-servants. *Sufferling v. Heyl & Patterson,* 510

Same: Negligence of foreman. See RAILROADS, 2, 14. WITNESSES, 7.

14. A foreman in charge of servants is required to exercise that degree of precaution and care for the servants' protection which ordinarily careful persons exercise under the same or similar circumstances. *Harsen v. Northern Pacific R. Co.* 186

Same: Anticipation of injury to servant.

15. Where service in handling heavy timbers is being performed in the open in the winter season, the fact that the timbers so exposed may naturally be covered with ice and snow and when handled slip and injure the servant should, by the exercise of ordinary care, be reasonably anticipated by the master or his foreman in charge of the work. *Harsen v. Northern Pacific R. Co.* 186

16. In an action for injuries to a servant caused by a sudden escape of acid from an earthenware spigot, evidence stated in the opinion is *held* sufficient to warrant submitting the question of the master's negligence to the jury. *Herring v. E. I. Du Pont de Nemours P. Co.* 412

17. Where an injury to a servant is within anticipation by a reasonably prudent and intelligent person, except that extreme care in the adjustment of the apparatus in use would probably have protected against the injury, the duty of making such adjustment resting upon a fellow-servant, the master's liability and its proximate causal relation with the servant's injury are established, even though the defect is effective only in conjunction with the negligence of the fellow-servant. *Ibid.*

Same: Assumption of risk.

18. An adult servant assumes all the risks of the employment which are obvious to a person of ordinary intelligence and prudence. *Johanson v. Webster Mfg. Co.* 181

19. It cannot be said as matter of law that a servant assumed the risk of his employment under the evidence, stated in the opinion. *Herring v. E. I. Du Pont de Nemours P. Co.* 412

Same: Contributory negligence. See RAILROADS, 12, 13.

20. Where, in an action for injuries to a servant, the evidence showed that the servant was responsible for scattering benzine on the floor of the work room and that the injury followed its ignition, if a finding by the jury that the master was neg-

ligent in permitting the place to become unsafe is allowed to stand, the servant must be deemed guilty of contributory negligence as matter of law. *Johanson v. Webster Mfg. Co.* 181

21. Where the evidence is not conclusive either that an injured servant did not know, or that as an ordinarily prudent person in his circumstances he should have known or foreseen, that there was any peril in placing himself in the position in which he was injured, the question of his contributory negligence should be submitted to the jury. *Herring v. E. I. Du Pont de Nemours P. Co.* 412

Same: Instructions to jury.

22. In an action against a principal contractor, where the servant of a subcontractor was injured by the falling of a hoisting apparatus which replaced a safe and suitable apparatus originally used, remarks of the court in the presence of the jury, and also remarks in submitting the case to the jury, are *held*, even if erroneous, so significantly in appellant's favor as to be harmless. *Sufferling v. Heyl & Patterson,* 510

MAXIMS.
Falsus in uno, falsus in omnibus, 82.
Res adjudicata pro veritate accipitur, 551.
Solus Deus hæredem facere potest, non homo, 559.
Stare decisis, 552.

MEASURE OF DAMAGES. See DAMAGES, 2–4. EMINENT DOMAIN, 3–7. LANDLORD AND TENANT, 1.

MINORS. See ADVERSE POSSESSION, 23.

MISCONDUCT of jury. See APPEAL, 20.

MISDEMEANOR. See MUNICIPAL CORPORATIONS, 4.

MISTAKE. See CONTRACTS, 10, 11. RELEASE.

MODIFICATION,
Of contracts. See CONTRACTS, 7–9.
Of judgment. See APPEAL, 24, 25.

MORTGAGES.

Nature and essentials.

1. In Wisconsin a mortgage merely gives a lien upon the land mortgaged for the money secured thereby; passes as an incident upon transfer of the note; when assigned separate from the note does not transfer the note, unless the note is in fact delivered; and is extinguished by the payment of the debt it is given to secure. *Tobin v. Tobin,* 494

Construction and operation. See STREET RAILWAYS, 2–4. TRUSTS AND TRUSTEES, 1.

Taxation. See TAXATION, 1

Foreclosure. See STREET RAILWAYS, 4.

Same: Leasehold interests.

2. As against purchasers of a leasehold and attached buildings and machinery who agreed to assume and pay a mortgage thereon as part of the purchase price, the property may, on foreclosure, be charged with the amount of the debt and its sale ordered in case of nonpayment. *Davis v. Williams,* 8

Same: Deficiency judgment.

3. An order for a judgment for deficiency is necessarily a part of a judgment of foreclosure, and is the final adjudication of the defendant's common-law liability for the debt, the formal judgment therefor being rendered and docketed as of course on the coming in and confirmation of the report of sale showing the amount of the deficiency. *Homestead Land Co. v. Saveland,* 663
4. That part of a foreclosure judgment ordering a judgment for deficiency is appealable. *Ibid.*
5. An appeal from a judgment for deficiency, entered after confirmation of the sale under a foreclosure judgment, does not enable the appellant to review the question of personal liability adjudicated by the foreclosure judgment, in the absence of an appeal from that judgment. *Ibid.*
6. Where the time for appeal from a judgment of foreclosure and sale has expired, a judgment for deficiency rendered thereon is not subject to review. *Ibid.*
7. A motion to vacate a judgment for deficiency, entered after confirmation of sale on foreclosure, is properly denied where the motion does not also include the vacation of the foreclosure judgment. *Ibid.*

MUNICIPAL CORPORATIONS.

Governmental powers and functions. See NAVIGABLE WATERS, 1–5.

Proceedings of common council: Ordinances: Validity and construction. See NAVIGABLE WATERS, 3, 4.

1. An ordinance of the city of Milwaukee designed to protect its harbor is *held* authorized by charter provisions stated in the opinion. *C. Beck Co. v. Milwaukee,* 340
2. Such ordinance is *held* valid municipal legislation as to portions of the beach of Lake Michigan taken into Milwaukee by extension of its boundaries after the passage of such charter. *Ibid.*
3. An ordinance of the city of Milwaukee which prohibits under penalty the removal of stone, sand, or earth from the beach or from the water within 300 feet of high-water mark, along or near the shore of Lake Michigan between the northern and southern limits of the city, is not objectionable as class legislation. *Ibid.*
4. The violation of a city ordinance which does not make such violation criminal, but provides a penalty, is not a misdemeanor, and recovery of the penalty is by a civil action under the ordinance. *Ibid.*
5. While the power of a municipal corporation to pass ordinances must be reasonably exercised, within the field delegated it may go to the boundaries of reason, and within that field its discretionary power is supreme. *Ibid.*
6. Municipal ordinances must receive a reasonable construction in the light of the purpose of their enactment; and, where they are capable of a construction that will carry out their manifest purpose, such construction must be adopted. *Ibid.*

Same: Functions and duties. See MUNICIPAL CORPORATIONS, 10, 13, 15.

Officers: Police officers: Appointment.

7. The marshal of a city occupies a position on its police force, and in cities of the second and third class cannot be legally elected or appointed to the office without the concurrence of the board of police and fire commissioners appointed under the requirements of sec. 959—40, Stats. (1898). *State ex rel. Brown v. Appleby,* 195

8. Under the statutes and city charters of Wisconsin the powers and duties conferred on the "city marshal," "chief of police," and "captain of police" are practically the same, and those terms are synonymous, each city being authorized to denominate a single officer any one of the three distinct names. *Ibid.*

9. The term "chief of police" is used in sec. 959—41, Stats. (Laws of 1907, ch. 61), in the sense of chief officer of police, or active head of the police department, and is not limited to an officer technically designated "chief of police." *Ibid.*

10. Sec. 959—40 *et seq.*, Stats. (Laws of 1907, ch. 61), confers upon the board of police and fire commissioners the power to appoint a chief of police and takes away from the common council power under the city charter to appoint. *Ibid.*

Streets: Vacation by court: Jurisdiction.

11. Whether or not the legislature can confer upon courts power to vacate public highways,—a point not considered,—no such power has been attempted to be conferred under the statutes of this state. *Petition of Hayes,* 163

12. Secs. 2265, 2266, Stats. (1898), simply authorize the vacation of plats or parts of plats and do not purport to authorize the vacation of streets or to interfere with or divest rights acquired under a plat by the public or by private parties. *Ibid.*

13. The vacation of streets of a city is vested exclusively in the common council, and hence in an original proceeding to vacate a part of a city street the circuit court is without jurisdiction and the proceeding should be dismissed. *Ibid.*

14. Nothing in the foregoing is intended to deny the circuit court power to vacate streets which merely appear in the plat but have not been accepted. *Ibid.*

Same: Paving contracts: Illegality: Taxpayer's action.

15. A municipality upon hearing of official misconduct of a member of its common council relative to a street-paving contract, violative of sec. 4475, Stats. (1898), has power, and it is its duty, to refuse to consummate an executory contract therefor, and this power and duty a taxpayer may enforce. *McMillan v. Fond du Lac,* 367

16. An offer by the holder of an executory contract for street paving to furnish a construction company, bidding on other street improvements, material therefor at a less price than that quoted by manufacturers (even though such manufacturers have unlawfully combined to raise the price of such material), made for the purpose of inducing a member of the common council, who was also interested in the construction company, to withdraw his official opposition to such executory contract, and carried out by concessions as to price, is within the condemnation of sec. 4475, Stats. (1898). The consent of the municipality to such executory contract, in part purchased by such con-

cession, is unlawful and invalid, and a taxpayer may enjoin its execution. *Ibid.*

17. To hold that such transaction is void only as between the holder of the executory contract and the construction company would be to make official immorality and consequent illegality a mere matter of judicial declamation. Nothing less than enjoining the execution of the executory contract is adequate to vindicate the law. *Ibid.*

Special assessments: Street improvements.

18. Under sec. 2, ch. 7, of the charter of Milwaukee, as amended by sec. 6, ch. 310, Laws of 1893 (sec. 959—35, Stats. 1898), and sec. 6 of said ch. 7, if the board of public works and the city council proceed regularly in the manner prescribed they have authority to order a street paved or repaved without a petition from the owners of the abutting property, and have the right to assess the cost thereof against such property to the extent of the benefits conferred. *Loewenbach v. Milwaukee,* 49

19. The word "paving" in said sec. 6 of ch. 7 of such charter is not restricted in meaning to original construction, but includes repaving. *Ibid.*

20. Under said sec. 6 of ch. 7 of such charter (since the enactment of ch. 310, Laws of 1893), after the limit of $3 per square yard has been reached, the owners of abutting property may, if the majority so wills, secure a more expensive pavement than the city proposes to construct by defraying the increased cost. *Ibid.*

21. Where the east forty-six feet of four lots as platted had been conveyed and assessed as a single parcel of land and constituted a homestead, such portions of the lots constituted for practical purposes a single lot fronting on the east and west street and were properly assessed as such for the paving of that street although only one of the lots as platted abutted thereon. *Ibid.*

22. In making an assessment of benefits and damages from a street improvement a board of public works should ascertain what such benefits and damages amount to on each parcel of land, instead of assuming that the benefits are equal to the cost of doing the work. *Ibid.*

MUNICIPAL COURTS. See MANDAMUS.

MURDER. See HOMICIDE.

NAVIGABLE WATERS.

Harbors. See MUNICIPAL CORPORATIONS, 1.

1. The legislature may, for public purposes, delegate legislative power to a municipality to protect its harbors. *C. Beck Co. v. Milwaukee,* 340

2. In the exercise of delegated legislative powers, a municipality having power to protect its harbors may prohibit the removal of materials below ordinary high-water mark when such removal may be injurious to the harbor. *Ibid.*

3. A municipal ordinance which prohibits under penalty the removal of stone, sand, or earth from the beach or from water within 300 feet of high-water mark, along or near a navigable lake between the limits of the municipality, does not assume to prohibit interference above high-water mark, but prohibits

the removal of such materials from the beach or from the water within 300 feet of high-water mark, along or near the shore of the lake; the word "beach" being synonymous with "shore"—that portion between ordinary high-water and low-water mark. *Ibid.*

4. Under a valid municipal ordinance prohibiting under penalty the removal of material from the beach or from water within 300 feet of high-water mark, along or near a navigable lake, threats by the municipality to prevent an owner from removing material above high-water mark do not justify an injunction restraining the municipality from enforcing such ordinance. *Ibid.*

5. Where a city has power under its charter to protect its harbor, an ordinance prohibiting the removal of material from the beach or from the waters within 300 feet of high-water mark along the shore does not infringe private rights of riparian owners. *Ibid.*

Lands under water: Great Lakes: Title to bed. See MUNICIPAL CORPORATIONS, 2, 3.

6. The title to the bed of Lake Michigan below ordinary high-water mark is in the state. *C. Beck Co. v. Milwaukee,* 340

NEGLIGENCE.

Acts and omissions constituting negligence. See MASTER AND SERVANT, 2–17. NEGLIGENCE, 10, 11. PARTIES. RAILROADS. STREET RAILWAYS, 6–10. TRIAL, 20, 23. WITNESSES, 7.

1. "Negligence" in the law consists of the omission or inadvertently wrongful exercise of duty, which omission or exercise is the legal cause of damage to another. *Hasbrouck v. Armour & Co.* 357

2. Such duty may, by operation of law, arise between two persons in contract relations, or may be imposed independently of contract relations by the written or unwritten law, or may be due to persons or to particular classes of persons. Such duty is, not to never fail, but not to fail under such circumstances that a reasonably prudent person might infer injury, as a natural and ordinary consequence of such failure, to one to whom the duty is due. *Ibid.*

Same: Privity.

3. With respect to the breach of a duty due from one person to all persons the liability of the wrongdoer does not depend upon privity between himself and the person injured. *Ibid.*

Same: Notice of injury. See STREET RAILWAYS, 5.

Same: Anticipation of injury.

4. Mere carelessness from which no injury to another can be anticipated is not negligence in the legal signification. *Sparks v. Wis. Cent. R. Co.* 108

5. Negligence in law is not mere carelessness, but is careless conduct under such circumstances that an ordinarily prudent person would anticipate some injury to another as a reasonably probable result thereof. *Johanson v. Webster Mfg. Co.* 181

6. The duty which the law imposes in favor of the user or consumer upon a manufacturer or dealer selling at wholesale to dealers generally, but not to consumers directly, is identical

with the duty imposed by law on all persons with respect to the public generally, and there is no privity, no particular relation carrying with it special duties or a special degree of care in such cases. *Hasbrouck v. Armour & Co.* 357

Same: Dangerous substances.

7. A manufacturer or dealer who puts out, sells, or delivers, without notice to others of its dangerous qualities, an article which invites a certain use, and which article is not inherently dangerous, but which by reason of negligent construction he knows to be imminently dangerous to life and limb, or is manifestly dangerous when used as it is intended to be used, is liable to any person suffering an injury therefrom, which injury might have been reasonably anticipated. *Hasbrouck v. Armour & Co.* 357

8. A manufacturer or dealer who puts out and sells articles inherently dangerous, without notice of their dangerous nature, or with a misleading notice, or negligently in any other way, is liable for an injury to any third person which might have been reasonably foreseen by the manufacturer or dealer in the exercise of ordinary care. *Ibid.*

9. A manufacturer or dealer who makes and sells an article intended to preserve or affect human life is liable to third persons sustaining injury caused by his negligence in preparing, compounding, labeling, or directing the use of the article, provided injury to others might have been reasonably foreseen in the exercise of ordinary care. *Ibid.*

10. An unintentional or negligent dropping of a needle into a mixture from which toilet soap is made is so remote a possibility, such an extraordinary occurrence, and serious injury to the consumer from using such soap for toilet purposes such an unusual and remote consequence of such act, that thereby there is no breach of a duty imposed upon the manufacturer for the protection of the vendee of his vendee, and no actionable negligence is shown. *Ibid.*

11. In such case the retailer, who did not know that the needle was imbedded in the soap, and who could not by the exercise of ordinary care have ascertained its presence therein, is not liable for injuries resulting to the purchaser from the needle. *Ibid.*

Same: Warranty.

12. A guaranty or warranty not knowingly false or fraudulent does not affect liability in tort for negligence. *Hasbrouck v. Armour & Co.* 357

Gross negligence.

13. To constitute gross negligence the act or omission causing the injury must itself have been wanton or wilful. *Gould v. Merrill R. & L. Co.* 433

Same: Pleading.

14. In an action for injuries alleged to have been caused by the negligent management of a street car, a complaint charging acts of the motorman to have been done "negligently, carelessly," etc., not intentionally, does not charge gross negligence, although it is also averred that the motorman knew the probable consequence of his acts. *Gould v. Merrill R. & L. Co.* 433

Proximate cause of injury. See MASTER AND SERVANT, 7, 17.

15. It is not necessary, to make a negligent act the proximate cause of an injury, that the particular injury should have been anticipated, but only that, in the exercise of reasonable foresight and intelligence, some injury to some person should have been anticipated as within the probabilities. *Sparks v. Wis. Cent. R. Co.* 108

16. Where a probable potential cause is shown which may be identified as the proximate cause and made to answer the legal definition thereof by inferences of fact from direct or circumstantial evidence before the jury, the jury may identify this as a proximate cause, although strict logic might discover other causes which the jury might from the same evidence have found to be the proximate cause. *Gould v. Merrill R. & L. Co.* 433

17. What is the proximate cause of an injury is usually and ordinarily a question of fact, and probative inferences from facts in evidence cannot be disposed of by styling them conjectures. *Ibid.*

Contributory negligence. See MASTER AND SERVANT, 20, 21. RAILROADS, 12, 13. TRIAL, 2, 22.

18. The test of contributory negligence is whether or not the person injured exercised the degree of care at the time that ordinarily careful persons exercise under the same or similar circumstances. *Gray v. Northern Pacific R. Co.* 419

Assumption of risk. See TRIAL, 22.

Instructions to jury: Ordinary care.

19. In a personal injury case an instruction to the jury: "By ordinary care is meant such care as a man of ordinary care and prudence would have used under circumstances like those disclosed in the testimony in this case," while it may be harmlessly inaccurate under the circumstances of the particular case, had better be phrased: "Ordinary care in the abstract is such care as the great mass of mankind ordinarily exercise, and as applied to any particular case it is such care as the great mass of mankind ordinarily exercise under the same or similar circumstances." *Sufferling v. Heyl & Patterson,* 510

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES.

NEWSPAPERS. See DAMAGES, 8, 9. LIBEL AND SLANDER, 2, 6.

NEW TRIAL.

Grounds. See CRIMINAL LAW, 10–12. EJECTMENT, 2, 4, 5.

Same: Newly-discovered evidence.

1. A new trial should not be granted for newly-discovered evidence which is merely cumulative. *Franck v. Stout,* 223

Same: Perjury of witness.

2. It is not ground for a new trial that a witness admits that he testified falsely at the trial upon a material fact. *Keeley v. Great Northern R. Co.* 448

Effect.

3. An order granting a motion for a new trial made after the entry of the judgment does not *ipso facto* vacate the judgment, and should not be entertained unless coupled with a motion to vacate the judgment. *Homestead Land Co. v. Saveland,* 663

NOTICE.
Of injury. See STREET RAILWAYS, 5.
Of meeting. See SCHOOLS AND SCHOOL DISTRICTS, 1.
Of possession. See ADVERSE POSSESSION, 2, 6–8, 12.

NOVATION.

1. The essentials of a novation are a mutual agreement to which the creditor, the old debtor, and the new debtor assent, by which the old obligation is extinguished and a new and valid obligation is created and takes its place. *Hemenway v. Beecher*, 399
2. Where a debtor transferred to a third person real and personal property, in consideration of which the third person agreed to pay his debt, and thereafter the debtor went to the creditor and told him of the arrangement, to which the creditor assented and agreed to accept the third person as obligor for the debt and release the debtor, the transaction constitutes a novation. *Ibid.*
3. In an action at law on a promissory note, where the plaintiff brings in a third person whom the defendant alleges had assumed the debt for a consideration, and by the amended complaint, containing a complete copy of the defendant's answer, apprised the third person of the claim he must prepare to meet, in the absence of a motion under sec. 2656*a*, Stats. (1898), for further pleadings, the issue is sufficiently framed to warrant overruling an objection that a novation was not alleged in the complaint. *Ibid.*

OFFICERS. See DAMAGES, 8, 9. FALSE IMPRISONMENT. MUNICIPAL CORPORATIONS, 7–10. SCHOOLS AND SCHOOL DISTRICTS.

OPINION EVIDENCE. See APPEAL, 11–14. EVIDENCE, 9–12.

ORDINANCES. See MUNICIPAL CORPORATIONS, 1–6. NAVIGABLE WATERS, 3, 4.

PARENT AND CHILD.

See WILLS, 3–5.

Where there is no express agreement by a father to pay for board furnished by his son, the latter cannot recover for such board. *Millis v. Thayer*, 480

PAROL EVIDENCE. See EVIDENCE, 6–8. REPLEVIN, 2.

PARTIES.

Joint tortfeasors.

1. In an action against two railroad companies for the negligent killing of plaintiff's intestate, testimony produced by plaintiff tending, in turn, to convict one railroad of negligence and exonerate the other, and convict the other and exonerate the one, justifies proceeding against both tortfeasors and the submission of the question whether or not the injury was due to concurrent negligence, or the unaided negligence of one, and, if so, which one. *Keeley v. Great Northern R. Co.* 448
2. In such situation the plaintiff, who had not seen the accident, was not obliged to try the case in advance and determine at her peril which testimony was true. *Ibid.*

PARTNERSHIP.

Contracts: Construction.

1. In a contract by which one partner agreed to secure logs at a cost not exceeding $7 per thousand and to manufacture and pile the lumber at an additional cost of not more than $4 per thousand, said amounts were not mere estimates, but the partner assumed thereby an obligation to furnish the lumber in pile at a cost not exceeding $11 per thousand and to pay personally any excess over such cost. *Lemma v. Blanding,* 156

Dissolution: Accounting: Good will.

2. On an accounting to determine the value of firm assets after the death of one partner, it is error for the trial court to disregard the findings of the referee appointed to hear, try, and determine the cause, based on a carefully verified appraisement of the firm property, made in a judicial proceeding, and also verified upon the trial by the same appraisers, and modify such findings, basing such ruling upon the usual inventory and appraisement last made by the deceased for the purpose of determining the state of his business with reference to the condition a year previous. *F. Dohmen Co. v. Niagara F. Ins. Co.* 96 Wis. 38, distinguished. *Ott v. Boring,* 403
3. On an accounting to determine the value of the firm assets after the death of one partner, the survivor is entitled to his share in the whole as an organized going business with its line of customers and connections with sellers as well as buyers, the merchandise, book accounts, and good will, such as there is, which can pass with a transfer of the whole as practically one thing. *Ibid.*
4. Although one partner dies, elements of good will remain in the business where there is opportunity for a purchaser to continue the same as a going business as successor of the decedent part proprietor, whose name has for years distinguished it, and opportunity to continue in the old stand, and otherwise to locate so near as to obtain substantial advantages from the reputation of the old business in connection with the old place, and thereby secure more out of the stock and accounts by dealing therewith in the usual way of a going business than in a closing-up transaction. *Ibid.*

Same: Interest.

5. When statements and accounts of a partnership upon which the partnership had to be closed and settled are in one partner's possession, and at no time was the other partner informed of the actual amount due from him, except under special circumstances interest is not to be allowed on the amount so due prior to the commencement of the action for an accounting. *Lemma v. Blanding,* 156

PAYMENT.

See TAXATION, 6, 16–18.

Payment, to be available as a defense, ordinarily must be pleaded. *Heber v. Estate of Heber,* 472

PENALTIES. See CONSTITUTIONAL LAW, 10. MUNICIPAL CORPORATIONS, 4, TAXATION, 19.

PERSONAL INJURIES. See DAMAGES, 7. EVIDENCE, 10. MASTER AND SERVANT, 2–22. NEGLIGENCE. RAILROADS. STREET RAILWAYS, 5–10. TRIAL, 20, 23.

PHYSICIANS AND SURGEONS. See EVIDENCE, 9–11.

PLEADING.

Framing issues. See NOVATION, 3.

Complaint. See ACTION. CONTRACTS, 5, 6. NEGLIGENCE, 14. TAXATION, 7. WITNESSES, 3.

Same: Construction.

1. In an action against two defendants, the complaint averring successive sales of a commodity by one defendant to the other and by the other to the plaintiff, an averment that both defendants "jointly caused to be placed upon the market and to be sold to the general public" such commodity is a legal inference of the pleader from the specific facts otherwise appearing in the complaint. *Hasbrouck v. Armour & Co.* 357

Same: Demurrer. See CONTRACTS, 6. PLEADING, 8, 10.

2. If facts stated in a complaint constitute a good cause of action, though not the one the pleader intended, the pleading is good as against a general demurrer. *Bieri v. Fonger,* 150
3. In testing a complaint for sufficiency the question is not whether it states the cause of action the pleader had in mind, or states the facts essential to a cause of action with technical accuracy and certainty, but is whether, giving the pleading the benefit of every reasonable inference, it expressly or by such inference, or both, states a good cause of action. *Ibid.*
4. Where a complaint states a cause of action for an assault and battery, and in addition states, defectively, a cause of action for trespass to realty but in a manner indicating that a cause of action of that character was in the pleader's mind, the complaint is good on demurrer because of the facts stated constituting the cause of action for assault and battery. *Ibid.*

Same: Amendment. See EVIDENCE, 2. STREET RAILWAYS, 5.

Same: Amendment to conform to proofs.

5. If a good cause of action is established on the trial and all controversies in reference to the matter are fully tried without objection, and such cause is within the jurisdiction of the court and might have been but was not fully pleaded, or was not the particular cause of action the pleader had in mind at the outset, though the facts are fairly stated, the complaint may be amended to conform to the proof, either before or after verdict, saving the substantial rights of the adverse party. *Bieri v. Fonger,* 150
6. In such situation, if necessary to sustain the judgment, the complaint will, on appeal, be deemed amended according to the judgment. *Ibid.*
7. Where evidence warrants a recovery in excess of the amount originally demanded, an amendment of the complaint to conform to the proof, increasing the amount of damages claimed, is proper. *Williams v. Arnold,* 177

Answer: Denials on information and belief. See LIBEL AND SLANDER, 6.

8. An answer denying upon information and belief that certain school orders mentioned in the complaint were legal orders or created any indebtedness, "but the same were void for the reasons hereinafter stated," and thereafter averring positively the facts upon which such invalidity was predicated, is sufficient as against an oral demurrer. *Rogers-Ruger Co. v. School Directors,* 135

9. Such answer does not aver the facts pleaded upon information and belief, but pleads that upon those facts the defendant was informed and believed that such orders were not legal orders. *Ibid.*

Counterclaim. See DIVORCE, 1.

10. Objection that a cause of action stated as a counterclaim is not pleadable as such, when apparent on the face of the answer, if not taken by demurrer is waived. *Heber v. Estate of Heber,* 472

Admissions in pleadings. See EVIDENCE, 2.

11. Where a complaint alleged the making of "a certain mortgage," describing it, an answer "admitting" the making of "a certain mortgage" of the same date, and containing no suggestion that it was other than the mortgage described in the complaint, admits the making of such mortgage. *Van Eps v. Newald,* 129

12. Admissions in an answer are presumptively referable and responsive to the allegations of the complaint. *Ibid.*

General denial. See CONTRACTS, 5. DIVORCE, 3.

POLICE AND FIRE COMMISSIONERS. See MUNICIPAL CORPORATIONS, 7, 10.

POLICE OFFICERS. See MUNICIPAL CORPORATIONS, 7–10.

POSSESSION. See ADVERSE POSSESSION. EVIDENCE, 8. TAX TITLES, 1–3. TRESPASS.

PRESUMPTIONS. See ADVERSE POSSESSION, 9. BILLS AND NOTES, 4. CRIMINAL LAW, 5.

PRINCIPAL AND AGENT. See BROKERS. DAMAGES, 8, 9.

PRINTED CASE. See APPEAL, 26–30.

PRIVILEGE. See EVIDENCE, 3. LIBEL AND SLANDER, 2–4.

PRIVITY. See ADVERSE POSSESSION, 13–16. EVIDENCE, 8. NEGLIGENCE, 3, 6.

PROMISSORY NOTES. See BILLS AND NOTES, 2–4.

PROTEST. See BILLS AND NOTES, 6. TAXATION, 6, 20.

PROXIMATE CAUSE. See MASTER AND SERVANT, 7, 17. NEGLIGENCE, 15–17.

PUBLIC RECORD. See EVIDENCE, 3, 4.

PUNITORY DAMAGES. See ASSAULT AND BATTERY, 1, 4, 5. DAMAGES, 8–10.

QUIETING TITLE. See TAX TITLES, 4.

RAILROADS.

Injuries to employees: Defective appliances. See PARTIES. WITNESSES, 7.

1. Where a locomotive engineer is using a defective engine which could not be held in place by brakes, he may be guilty of negligence in approaching so close to cars as to be unable to check

an involuntary movement of the engine until too late to avoid injury to one between the cars. *Keeley v. Great Northern R. Co.* 448

Same: Line of duty: Scope of employment.

2. A railway employee directed by his foreman to place certain engines on a designated track is within the proper course of his duty in throwing a switch so as to permit the engines to run thereon. *Gray v. Northern Pacific R. Co.* 419

3. A railway employee in the line of his duty has a right to have a locomotive, operated in connection with his duties, operated and managed with ordinary care and prudence. *Ibid.*

4. Evidence that an engineer started his locomotive before any signal to start was given, it being customary to give such signal, permits the inference that the locomotive was mismanaged and negligently started. *Ibid.*

Same: Management of railroad yards.

5. The moving of cars through a railroad yard without any signal or lookout at the forward end of the moving cars will support a finding of negligence, in an action for injuries to a servant caused thereby. *Sparks v. Wis. Cent. R. Co.* 108

6. Negligence in moving cars through a railroad yard without any signal or lookout at the forward end thereof is the negligence of the company if it has prescribed no rule requiring such precautions; or it may be that of fellow-servants if they fail to comply with sufficient and adequate rules. *Ibid.*

7. The unwarned shunting of cars over tracks, in railroad yards where men are variously employed upon and about tracks upon independent work engrossing their attention, supports an inference of the master's negligence and its causal connection with the servant's injuries. *Ibid.*

Same: Car-repairer.

8. The business of repairing cars standing on repair tracks should be conducted by a railway company with such precautions, including the making and enforcing of proper rules and regulations, as will reasonably guard employees engaged therein against avoidable dangers. *Steber v. Chicago & N. W. R. Co.* 10

9. In an action for the death of a car-repairer who was killed by the switching of other cars against the one under which he was at work, it is *held* upon the evidence that it was a question for the jury whether a signal flag or board had been put up by the deceased before such car, as required by the rule of the railway company. *Ibid.*

10. Refusal to submit in the special verdict specific questions as to whether the deceased had placed such a car-repairer's signal on the track before he went to work, and whether such signal was in place when the other cars were switched onto that track, was not prejudicial error in this case, in view of the instructions given on that subject in submitting the general question as to contributory negligence of the deceased; but submission of such specific questions would have been proper and helpful. *Ibid.*

Same: Car inspector.

11. Under sec. 1816, Stats. (1898), it is immaterial whether injuries to a car inspector were caused by failure to prescribe sufficient.

and adequate rules for the government of railroad employees, or by failure of fellow-servants to comply with the rules prescribed. *Sparks v. Wis. Cent. R. Co.* 108

12. Whether or not a car inspector was guilty of contributory negligence in placing himself in a position of danger presented a question for the jury, and hence it was error to direct a verdict for the defendant. *Ibid.*

Same: Contributory negligence.

13. Since railroad employees must necessarily place themselves in dangerous positions in the course of their employment, they are not necessarily negligent in so doing, as acts on their part which are customary and proper would be obvious negligence in others. *Sparks v. Wis. Cent. R. Co.* 108

Same: Instructions to jury.

14. In an action for the death of a switch foreman, alleged to have been due to negligence of an engineer in backing his engine, the complaint not charging negligence by the use of defective machinery, it is not prejudicial error for the court to charge as stated in the opinion, the court by various instructions having impressed on the jury that they were to consider only whether or not the engineer failed in his duty to hold his engine in place. *Keeley v. Great Northern R. Co.* 448

15. In an action by a widow, as administratrix, for negligence causing the death of her husband, it is not error to instruct the jury that plaintiff can recover the value of her "support and protection" by her husband during the time he might have lived. *Ibid.*

RATIFICATION. See CONTRACTS, 4. DAMAGES, 8, 9.

REAL PROPERTY. See ADVERSE POSSESSION. DEEDS. EVIDENCE, 8. EXECUTORS AND ADMINISTRATORS, 4. TAXATION, 3, 5–7. TAX TITLES. TRESPASS. TRUSTS AND TRUSTEES. WILLS, 2, 5.

REASONABLE DOUBT. See CRIMINAL LAW, 6–9.

RECEIPTS. See EVIDENCE, 7.

REFERENCE. See APPEAL, 17, 18.

REGISTRATION. See TRADE-MARKS, 10, 12, 16, 17.

RELEASE.

See CONTRACTS, 2. EVIDENCE, 8.

To impeach a formal written release on the ground of fraud or mistake the proof must be clear and convincing beyond reasonable controversy. *Schiefelbein v. Fidelity & C. Co.* 612

REMARKS OF COUNSEL. See CRIMINAL LAW, 1.

REPLEVIN.

See CONTRACTS, 10. CORPORATIONS, 9, 10. TROVER AND CONVERSION, 2.

Replevin by chattel mortgagee.

1. In replevin by a chattel mortgagee against the purchaser of the mortgaged property with notice of the mortgage, it is immaterial that the note secured by the mortgage had been altered. *Van Eps v. Newald,* 129

2. In an action to recover chattel mortgaged property, evidence that the mortgage thereon was executed, delivered, and filed, of which defendant had full notice when he purchased the property, establishes plaintiff's right to the property to secure his indebtedness to an amount not greater than that named in the mortgage. The amount of such indebtedness can be proved by parol. *Ibid.*

RES ADJUDICATA. See DIVORCE, 1, 2. MORTGAGES, 6. TAXATION, 20.

RESCISSION. See CONTRACTS, 10, 11. CORPORATIONS, 9.

RESULTING TRUSTS. See TRUSTS AND TRUSTEES.

REVOCATION. See BROKERS, 3, 9.

RIPARIAN RIGHTS. See NAVIGABLE WATERS, 2–5.

RULES. See MASTER AND SERVANT, 7. RAILROADS, 6, 8, 11.

RULES OF COURT.
Supreme Court Rule 6 (Printed case), 109, 114, 119, 125, 182, 186, 413, 418, 449, 455.
Supreme Court Rule 44 (Costs), 114, 186, 413, 418.
Circuit Court Rule XIX (Continuance), 57, 64, 66.
County Court Rule XIV (Adjustment of claims), 479.

SALARIES. See SCHOOLS AND SCHOOL DISTRICTS, 5.

SALES.
Modification or rescission. See CORPORATIONS, 9.
Performance or breach. See CONTRACTS, 7.
Warranties. See CONTRACTS, 7, 11, 13.

SCHOOLHOUSES. See BURGLARY.

SCHOOLS AND SCHOOL DISTRICTS.

Notice of meetings: Proof of lack of notice.

1. The answer "yes" by a member of a board of school directors to the question whether or not there were any meetings of the board which he did not attend because not notified, is an insufficient mode of proving lack of notice. *Rogers-Ruger Co. v. School Directors,* 135

School boards: Duties: Auditing accounts: Issuing orders.

2. Under secs. 518 to 530, Stats. (1898), the power of the board of school directors under the township system, or the executive committee thereof acting as a board, to create obligations against the district and to audit claims and control the issuing of orders, carries with it the duty to do so where the public interests are concerned. *Rogers-Ruger Co. v. School Directors,* 135

School orders: Invalidity: Evidence: Burden of proof.

3. In an action on school orders the burden of proof is upon the defendant to sustain an affirmative defense of invalidity of the meetings at which the orders were authorized, and such defense is not sustained by the offer of a page here and there from the records of meetings of the school board, without further showing that the meetings were in fact irregular. *Rogers-Ruger Co. v. School Directors,* 135

4. In an action on orders of a board of school directors the defendant has the burden of proof on the issue of their invalidity. *Rogers v. School Directors,* 143

Same: Salaries of school officers.

5. In the absence of evidence that the president and secretary of a school board were to receive no salary, or what orders covered their salaries, it cannot be said that orders issued to such officers for services are void. *Rogers-Ruger Co. v. School Directors,* 135

SELF-DEFENSE. See ASSAULT AND BATTERY, 2–6. HOMICIDE.

SETOFF. See EXECUTORS AND ADMINISTRATORS, 3.

SETTLEMENT. See ADVERSE POSSESSION, 22. CONTRACTS, 8.

SHORE. See NAVIGABLE WATERS, 3.

SIGNATURES.

1. In support of the verdict of a jury, the testimony of a witness, as to an instrument and signature before her, stated in the opinion, is *held* a specific denial of the signature within the meaning of sec. 4192, Stats. (1898), although by reason of confusion in other answers of the witness the jury might have understood either that she denied the act or that she merely denied memory of it. *Illinois Steel Co. v. Paczocha,* 23

[2. Whether an instrument bearing the name "Eva Stein" "purports to have been signed or executed" by Eva Steen, within the meaning of sec. 4192, Stats. (1898), not determined.] *Ibid.*

SLANDER. See DAMAGES, 8, 9. LIBEL AND SLANDER.

SPECIAL ASSESSMENTS. See MUNICIPAL CORPORATIONS, 18–22.

SPECIAL BENEFITS. See EMINENT DOMAIN, 9.

SPECIAL VERDICT. See RAILROADS, 10. TRIAL, 8, 20–23.

STATE TAX. See TAXATION, 12.

STATUTE OF FRAUDS. See CONTRACTS, 9.

STATUTES.

Negotiable Instrument Law. See BILLS AND NOTES, 1.

Foreign statutes. See TAXATION, 11.

Construction. See ADVERSE POSSESSION, 2, 3, 9–11, 16, 19. BILLS AND NOTES, 1, 6. BURGLARY. CONSTITUTIONAL LAW, 5–13. CORPORATIONS, 1, 2, 11, 12, 14–17. COSTS, 2. CRIMINAL LAW, 1, 13, 15, 16. DAMAGES, 6. EJECTMENT. EXECUTORS AND ADMINISTRATORS, 3. GIFTS, 2. INSANE PERSONS, 2. LIBEL AND SLANDER, 18. MASTER AND SERVANT, 2–4. MUNICIPAL CORPORATIONS, 7, 9, 10, 12, 15, 16, 18–20. RAILROADS, 11. SCHOOLS AND SCHOOL DISTRICTS, 2. SIGNATURES. STATUTES, 2. STREET RAILWAYS, 5. TAXATION, 1–4, 10–19. TAX TITLES, 1–3. WILLS, 3.

Amendment or repeal. See CORPORATIONS, 17. DAMAGES, 5, 6. STATUTES.

Same: Retained provisions.

1. Provisions of a prior law retained in an amendatory act are not deemed to have been repealed and again enacted, but as having existed and continued from the time of their original enactment. *State ex rel. Ohlenforst v. Beck,* 37

2. The prohibition in sec. 3, ch. 230, Laws of 1903, was continued by ch. 486, Laws of 1907, and was not repealed and re-enacted,

and one who in 1906 had established a bakery in violation of the act of 1903 was not entitled to a license to operate it under the act of 1907. *Ibid.*

STATUTES CITED, ETC.

(See page xix, following CASES CITED.)

STOCK AND STOCKHOLDERS. See CORPORATIONS, 1–7, 13, 15–17.

STREET RAILWAYS.

Construction contracts.

1. Under a contract with a street railway company for construction of its track whereby the railway company is to pay the actual cost of completing its line, plus fifteen per cent. to cover the work of engineering and supervision by the contractor, settlement to be made each month, the contractor is in effect the agent and employee of the railway company. *Haynes v. Kenosha Electric R. Co.* 227

Mortgages: Property included.

2. As to materials that are affixed to and made a part of a street railroad which is subject to a mortgage, both present and future property will be subject to the lien of such mortgage in favor of *bona fide* mortgage bondholders, in superiority to any contract between the vendor of the materials and the railway company. *Haynes v. Kenosha Electric R. Co.* 227

3. A transaction stated in the opinion is *held* to have been in legal effect between a construction company and a street railway company, to have vested title to partially completed track in the latter, and to have been sufficient consideration for bonds issued. *Ibid.*

Same: Foreclosure: Judgment.

4. Where a street railway company, operating under a supposedly valid franchise, but which was afterwards declared invalid, issued its bonds to a construction company to the amount in value of labor and material wrought into its property, the benefit of which was used and appropriated by a successor street railway company, on foreclosure the fair and reasonable value of such labor and material to the successor company, to that amount and no more, is a lien upon the property of the successor company, prior to any lien originating subsequent to the recording of the mortgage securing such bonds, to satisfy which the whole property of the successor company may be adjudged sold. *Haynes v. Kenosha Electric R. Co.* 227

Negligence: Notice of injury.

5. A street railway company is not one of the railroad corporations covered by sec. 1816*b*, Stats. (1898), and an action for injuries to a team of horses is not one to recover damages for injury to the person mentioned in subd. 5, sec. 4222. Hence it is proper to deny an application for leave to amend an answer interposed in an action for damages arising from the killing of a team of horses by the negligence of a street railway company, so as to allege the commencement of the action more than one year after the injury, and that no notice of the injury was given. *Gould v. Merrill R. & L. Co.* 433

Injuries to passengers: Starting car while passenger is alighting.

6. A street-car conductor who starts his car when he knows a passenger is in the act of alighting is guilty of negligence as matter of law. *Jirachek v. Milwaukee E. R. & L. Co.* 505

7. Evidence that a street-car conductor who was on the rear platform as a passenger was alighting and saw the passenger in the act, rang the bell for the car to start, in connection with findings otherwise sufficient to charge the street-car company with negligence, renders unnecessary a formal finding of negligence. *Ibid.*

Injuries to travelers: Negligence of motorman. See NEGLIGENCE, 14.

8. Where the only negligence which could be charged against a street railway company consisted in the motorman unnecessarily continuing to sound his gong after he saw the frightened condition of a team of horses or in failing to stop or slacken the speed of his car under the same circumstances, under the facts, stated in the opinion, the railway company is liable. *Gould v. Merrill R. & L. Co.* 433

9. A motorman of a street car is required to keep a proper lookout to avoid collision with persons or vehicles also using the street, and to do all that an ordinarily prudent and careful person under like circumstances would do to avoid injuring others lawfully using the streets. *Ibid.*

10. Whether or not, considering the shortness of time that a motorman rang his gong and the shortness of the distance traversed after he was aware of the frightened condition of a team of horses, the motorman was negligent in failing to slacken his speed or stop ringing his gong, is for the jury. *Ibid.*

STREETS. See MUNICIPAL CORPORATIONS, 11–22.

SUPREME COURT. See APPEAL. MANDAMUS, 1, 2.

TACKING. See ADVERSE POSSESSION.

TAXATION.

Liability of property. See CONSTITUTIONAL LAW. CORPORATIONS, 7.

Same: Mortgages.

1. Sec. 2, ch. 378, Laws of 1903, applies to a mortgage on land in this state, to the extent of the value of the land, even though such debt is secured also by a mortgage on land without the state or by a mortgage of personal property. *State ex rel. Heyl v. Hinkel,* 41

2. Sec. 9 of said ch. 378 does not exclude from the operation of the act a mortgage on property subject to such direct assessment and taxation merely because it also covers other property. *Ibid.*

Same: Growing crops: Ginseng.

3. Ginseng, a plant the roots of which are the marketable and valuable part and require from seven to fifteen years to mature, is, for the purpose of taxation, real estate and not personalty, and is not within the calls of subd. 11, sec. 1038, Stats. (1898), exempting from taxation, among other articles of personal property, "growing crops." *Kuehn v. Antigo,* 132

4. The phrase "growing crops" in subd. 11, sec. 1038, Stats. (1898), is used in a restricted sense, and applies to those annual products of the soil which are commonly treated as personalty. *Ibid.*

Same: Uniformity. See CONSTITUTIONAL LAW.

Remedies for wrongful taxation: Complaint.

5. Neither a town nor a town officer has authority to create a cloud upon the title to real estate by mere levy under a tax warrant. *Duluth Log Co. v. Hawthorne,* 170

6. Injunction will not lie to prevent a town treasurer from levying upon personal property under his tax warrant. The remedy in such case is to pay the tax under protest and bring suit to recover the unlawful excess, if any. *Ibid.*

7. In an action to declare void and to set aside assessments on both real and personal property and to enjoin enforcement thereof, a complaint which fails to allege that the assessment against the real estate, taken alone, was either excessive or discriminatory, and contains averments relative to intentional discrimination and to omission of property from the assessment roll, specifying no property, vague and general, and in the nature of conclusions of the pleader, does not state a cause of action. *Ibid.*

Tax certificates: Purchase by landowner pending action to annul tax: Recovery of money paid.

8. After action brought to set aside a tax levy, a purchaser of tax-sale certificates *pendente lite* is bound by the judgment rendered therein even though no notice of *lis pendens* was filed. *Lamoreux v. Bayfield County,* 394

9. A judgment annulling a tax necessarily destroys any tax certificate issued by virtue of such tax and defeats any deed issued on such certificate. *Ibid.*

10. Where the tax, assessment on which it was based, and tax certificates issued thereon have been adjudged void, such tax certificates are destroyed for all purposes except as evidence of indebtedness of the county to the holder, and hence the owner of lands on which such certificates have been issued may buy them on an equal footing with a stranger to the title, and with the same right, under sec. 1184, Stats. (1898), to collect their face and interest from the county. *Ibid.*

Inheritance tax: Construction of statute: Laws of other states.

11. The provisions of ch. 44, Laws of 1903, are in substance those of the New York transfer tax act, and hence, so far as applicable, the decisions of courts of that state are an aid in construing the Wisconsin statute. *State v. Pabst,* 561

Same: Constitutionality. See CONSTITUTIONAL LAW, 1, 5–13.

Same: Jurisdiction of county court.

12. The inheritance tax law is a law providing for the levying of a state tax, and the acts of the county court are but steps in the enforcement of a tax law of the state rather than judgments in judicial controversies. *Beals v. State,* 544

Same: Operation. See CORPORATIONS, 7.

13. Ch. 44, Laws of 1903, does not restrict persons in their right to transfer property in all legitimate ways, but taxes all transfers which are impressed with the characteristics of a devolution made at the time of the donor's death. *State v. Pabst,* 561

Same: Time of accrual of tax.

14. The inheritance tax imposed by ch. 44, Laws of 1903, is imposed on the transfer at the time of the death of the transferor and

rests as a lien upon the property so transferred until paid. *State v. Pabst,* 561

15. Under the provisions of ch. 44, Laws of 1903, the terms declaring when the tax accrues and when it becomes due and payable are used as equivalents, and prescribe that the tax accrues at the time of the transfer, except as to estates so limited, conditioned, dependent, or determinable upon future contingencies that their value cannot be presently ascertained; that as to those the tax becomes due and payable and accrues at the time of the actual possession and enjoyment. *Ibid.*

Same: Payment.

16. Payment of the inheritance tax by the first beneficiary of a defeasible estate is not in the nature of an advancement. *State v. Pabst,* 561

17. Beneficiaries under a will and deed of gift are *held* to have a right to the property and income from the donor's death, and the value of their interests at that time to be ascertainable for the purpose of fixing the amount of the inheritance tax. *Ibid.*

18. The beneficiary of a transfer in trust, on condition that the beneficiary shall receive only the income thereof during life, unless the beneficiary shall have a child which shall attain a certain age, takes an estate dependent upon conditions or contingencies which may extend or change the life estate into a fee, and, under subd. 5, sec. 13, ch. 44, Laws of 1903, the tax should be assessed and collected at the lowest possible rate under the conditions on which it passes at the time of the transfer, subject to reimbursement out of the corpus of the estate transferred in event that no more than a life interest is enjoyed. *Ibid.*

Same: Penalties.

19. Litigation to determine doubtful and perplexing questions as to liability of transferees for inheritance tax, and delays occasioned thereby, constitute "necessary litigation or other unavoidable delays" within sec. 6, ch. 44, Laws of 1903, and under such circumstances the penalty of ten per cent. interest for nonpayment should not be imposed. *State v. Pabst,* 561

Same: Review: Appeal or independent action?

20. The order of a county court fixing the amount of inheritance tax and assessing the same against a decedent's estate is not *res adjudicata* on that question, requiring review by appeal directly therefrom, and barring the prosecution of an independent action to recover an unlawful imposition paid under protest. *Beals v. State,* 544

TAXPAYERS' ACTIONS. See MUNICIPAL CORPORATIONS, 15, 16.

TAX TITLES.

Vacant and unoccupied lands: Constructive possession.

1. Facts stated in the opinion warrant a finding that land was not vacant and unoccupied within the meaning of sec. 1187, Stats. (1898). *Flanders v. Washburn Land Co.* 390

2. Constructive possession under a recorded tax deed only ripens into an absolute title where the lands remain vacant and unoccupied continuously during the whole period named in the statute. *Ibid.*

3. Sec. 1190, Stats. (1898), defining what shall constitute "possession" within the meaning of the preceding sections, relates to the meaning of that word in secs. 1187 and 1189, rather than to the meaning of the words "vacant and unoccupied." *Ibid.*

Repayment of taxes paid by tax-title claimant.

4. Where the statute of limitations has divested the title of the tax-deed claimant, in an action to quiet title the original owner is not required, as a condition of recovery, to tender or pay any part of the taxes. *Flanders v. Washburn Land Co.* 390

TENDER. See CORPORATIONS, 9.

TERMS OF COURT. See COURTS.

TRADE-MARKS AND TRADE-NAMES.

Marks and names subject to ownership.

1. The exclusive right to use words, letters, or symbols to indicate merely the quality of goods to which they are affixed cannot be acquired, unless the primary object of the trade-mark be to indicate origin or ownership. *Avenarius v. Kornely,* 247

2. The rule that a name cannot be a trade-mark or trade-name only applies when the name is used to describe the kind or quality of the thing sold and not the article of a particular maker or seller. *Ibid.*

3. A trade-mark which in its original signification or by association distinctly points to the origin or ownership of the article to which it is applied will be protected, while a generic or geographical name, designating a city or district or country, or merely descriptive of the article, and which may be employed with truth by others, is not entitled to legal protection as a trade-mark. *Ibid.*

4. An inventor of a wood-preserving paint called it "Carbolineum," and under the evidence, stated in the opinion, such word was *held* a valid trade-mark. *Ibid.*

5. Newly coined words are, as a general rule, sustained as proper trade-marks, since such words, being generally meaningless, cannot be either descriptive or deceptive. *Ibid.*

6. Where a product is manufactured and the compound is a secret invention, the inventor may coin a new name for his product by which it is to be known, and is entitled to protection of such trade-mark or trade-name against an objection that thereby the name became *publici juris.* *Ibid.*

7. A valid trade-mark may consist of some novel device, arbitrary character, or fancy word applied without special meaning, which by use and repetition comes to serve the same purpose. Such words and devices indicate sufficiently the true source and origin of the goods without particular addition of the name of the manufacturer or dealer. *Ibid.*

Same: Title.

[8. *It seems* that where one owning a newly patented product gives it a name, such name becomes *publici juris* on the expiration of the patent.] *Avenarius v. Kornely,* 247

9. Where a trade-mark antedated a patent covering the product to which the trade-mark was applied by about twelve years, the expiration of the patent in no way affects the trade-mark. *Ibid.*

10. Evidence that a word was constantly used as a trade-name, that the owner applied for its registration in various foreign countries and was diligent in his efforts to protect it as his trade-name, and that he subsequently used his own name in connection with such word and registered the same in the United States Patent Office, sustains a finding that such owner never abandoned such word as a trade-name. *Ibid.*

11. One is not confined to one form of his trade-mark. *Ibid.*

Registration.

12. Registration neither creates nor destroys rights in a trade-mark. Such rights are not created by act of Congress and do not depend upon it for their enforcement, but upon priority of appropriation. *Avenarius v. Kornely,* 247

Infringement and unfair competition.

13. An owner of an original trade-mark will be protected in the exclusive use thereof, and, to constitute an infringement, it is not necessary that every word of the trade-mark should be appropriated. It is sufficient that enough be taken to deceive the public in the purchase of the protected article. *Avenarius v. Kornely,* 247

14. One is to be protected in his trade-mark or trade-name against another who, with intent to deceive, has appropriated such trade-mark or trade-name for his own benefit and to the owner's damage, although there is no material difference between the products of each. *Ibid.*

Same: Actions.

15. Actions to restrain the infringement of trade-marks are based on the doctrine that the law will not allow one person to sell his own goods as and for the goods of another. This is to prevent not alone fraud upon private rights but upon the public as well. *Avenarius v. Kornely,* 247

16. In an action to enjoin the use of a foreign trade-mark it is immaterial whether the owner could or could not have registered it in foreign countries under their laws. The question is whether the claim to protection is in harmony with the law, written or unwritten, of this country *Ibid.*

Same: Laches.

17. One is not guilty of laches in protecting his trade-mark who, claiming rights thereby, has always been diligent in his endeavors to protect it, and had applied for registration thereof in the United States before it had been used by any other person for any purpose. *Avenarius v. Kornely,* 247

TRESPASS.

See ADVERSE POSSESSION, 6, 7. PLEADING, 4.

Entering dwelling house: Possession by wife.

The entry by a person into the home of husband and wife for an unlawful purpose without the wife's consent, she being by reason of the absence of her husband exclusively in possession of the premises, is a trespass to realty—a violation of the wife's possession. *Bieri v. Fonger,* 150

TRIAL.

Reception of evidence. See ADVERSE POSSESSION, 20, 22. APPEAL, 2, 4, 5, 9, 22. ASSAULT AND BATTERY, 1. CONTRACTS, 12, 13. CRIMINAL LAW, 1–4. EMINENT DOMAIN, 7, 10, 11. EVIDENCE, 5–11. FALSE IMPRISONMENT, 3, 4. LANDLORD AND TENANT, 3. LIBEL AND SLANDER, 2, 5, 10–16.

Arguments and conduct of counsel. See CRIMINAL LAW, 1.

Taking case or question from jury: Questions of fact. See FALSE IMPRISONMENT, 1. MASTER AND SERVANT, 16, 21. RAILROADS, 9, 12. STREET RAILWAYS, 10.

1. Where the inferences from the evidential facts are not so clear and obvious that it can be said that reasonable minds could not differ in their conclusions, the situation presents a proper subject for determination by a jury. *Harsen v. Northern Pacific R. Co.* 186

2. Where the evidence is conflicting the question of contributory negligence is for the jury. *Bucher v. Wis. Cent. R. Co.* 597

Instructions to jury: Province of court and jury. See APPEAL, 3, 23. ASSAULT AND BATTERY, 2–6. CRIMINAL LAW, 5–9. DAMAGES, 3, 7, 10. EMBEZZLEMENT, 3, 4. EMINENT DOMAIN, 4–9. HOMICIDE, 3. LIBEL AND SLANDER, 13, 17, 18. MASTER AND SERVANT, 22. NEGLIGENCE, 19. RAILROADS, 14, 15.

Same: General rules: Form and language used.

3. A trial judge may exercise his own discretion as to the mere language used in expounding principles of law, but where there exists a phrasing of an important rule approved by this court, the better administration is to follow it. *Miller v. State,* 57

4. Neither the statutes nor the unwritten law prevents a trial judge from incorporating all approved requests to instruct in the general charge, so as to cover every phase of the case properly requested by counsel to be given, without repetition and in logical order. *Ibid.*

5. Where an instruction is so involved that it did not, in any reasonable probability, impress the minds of the jury with any idea in the case one way or the other, it may be regarded as harmless error. *Ibid.*

6. A suggestion in the charge to a jury in a criminal case of the existence of a phase of the case prejudicial to the accused, which is not warranted by the evidence, is harmful error. *Ibid.*

7. In instructions to the jury the use of the adjective form "ordinary" instead of the adverbial form "ordinarily," to qualify or modify the adjective "prudent," is not ground for reversal unless the jury were misled thereby. *Gould v. Merrill R. & L. Co.* 433

Same: Burden of proof. See TRIAL, 19.

8. It is not error to instruct as to where the burden of proof is upon questions submitted for special verdict, although the jury are thereby informed as to the effect of their answers. *Illinois Steel Co. v. Paczocha,* 23

9. Instruction as to the burden of proof upon an immaterial question is harmless. *Ibid.*

Same: Credibility of witnesses: Rejection of testimony.

10. A charge to the jury which in effect told them they might reject the testimony of any witness if they found reasons satisfactory to their own minds for so doing, even though it had been admitted by the court as relevant and material to the issues, was erroneous. *Steber v. Chicago & N. W. R. Co.* 10

11. A charge that if the jury found that the interest of a witness in the case was such that he testified falsely they might throw out his testimony, was erroneous,—the true rule being that if the jury believed a witness had testified wilfully falsely in regard to any matter material to the case they had the right, if they saw fit, to reject all of the evidence of such witness not corroborated by some credible evidence produced. *Ibid.*

12. The errors committed in giving the above-mentioned separate and distinct portions of the charge in submitting separate issues, were not cured by subsequent general instruction to the jury respecting their duty to determine the weight of evidence and credibility of witnesses. *Ibid.*

13. Where a witness who had been examined under sec. 4096, Stats. (1898), on cross-examination on the trial admitted the making of some statements on his examination contradictory to those made on the trial, an instruction, stated in the opinion, while inaccurate, is *held* not to have misled the jury. *Jirachek v. Milwaukee E. R. & L. Co.* 505

Requests for instructions: Necessity. See APPEAL, 23. ASSAULT AND BATTERY, 3. DAMAGES, 10. EMBEZZLEMENT, 3, 4. TRIAL, 4.

14. Failure to give instruction limiting evidence to a certain effect was not error where there was no request for such instruction. *Illinois Steel Co. v. Paczocha,* 23

Same: Refusal.

15. Refusal to give correct requested instructions is not error where the instructions given fairly cover the points contained in the requests. *Gould v. Merrill R. & L. Co.* 433

16. It is not error to refuse a requested instruction which has no basis in the evidence. *Smith v. Goldberg,* 423

17. It is not error to refuse a correct requested instruction where its substance is embraced in the charge as given. *Jirachek v. Milwaukee E. R. & L. Co.* 505

18. Requested instructions, not applicable to the evidence given on the trial, are properly refused. *Ibid.*

19. While a correct requested instruction that the burden of proof to show his damages is upon the plaintiff should properly have been given, its omission is not prejudicial, where the court fully and explicitly charged the jury to allow only such damages as were proven by the evidence to a reasonable certainty to have been sustained as the natural and probable consequence of the injury. *Ibid.*

General verdict. See APPEAL, 11, 12, 14. RAILROADS, 12.

Special verdict. See RAILROADS, 10. TRIAL, 8.

20. In an action for injuries to a servant caused by an unsuitable hoist, where knowledge, actual or constructive, of the defendant of the unsuitable character of the hoist was charged in the complaint and denied in the answer, if that issue was a vital matter it should be submitted as a special question of the special verdict, if requested. *Sufferling v. Heyl & Patterson,* 510

21. While it is better that the law governing special verdicts be administered according to its spirit and letter and to a somewhat technical degree where specific questions are requested covering well defined vital facts in issue, it is permissible for trial courts to exercise a considerable measure of discretion in that regard, which is not subject to review unless the statutory right is prejudicially invaded. *Ibid.*

22. In a personal injury case submission as part of the special verdict of a question concerning the contributory negligence of plaintiff, together with an instruction: "If you find that the plaintiff knew or had reasonable means of knowing the danger of coming in contact with" the obstruction causing his injury, the jury should answer the question "yes," sufficiently covers the question of assumption of risk. *Bucher v. Wis. Cent. R. Co.* 597

23. Where there is no request to submit a question as part of the special verdict, but merely an exception taken to the verdict because it fails to contain such question, error cannot be assigned thereon. *Ibid.*

Trial by court: Findings of fact. See APPEAL, 1, 6–14, 17. CORPORATIONS, 7, 11. EXECUTORS AND ADMINISTRATORS, 1, 2. GIFTS, 3. TAX TITLES, 1.

TROVER AND CONVERSION.

1. An executor or administrator may in an appropriate case maintain an action for conversion, or he may waive the tort and sue on implied contract. *Heber v. Estate of Heber,* 472

2. Questions of title can be tried in an action for conversion as well as in an action for replevin. *Ibid.*

TRUSTS AND TRUSTEES.

Resulting trusts.

1. A mortgage is not a "grant" within the meaning of that word as used in sec. 2077, Stats. (1898). *Cerney v. Pawlot,* 66 Wis. 262, and *Meier v. Bell,* 119 Wis. 482, in so far as they hold that sec. 2077 applies to mortgages, overruled. *Tobin v. Tobin,* 494

2. Sec. 2077, Stats. (1898), applies exclusively to real property, and the "grant" therein referred to means an absolute conveyance of the land by which the title is vested in the grantee named. *Ibid.*

UNDERTAKINGS. See EJECTMENT, 1–4.

UNILATERAL CONTRACT. See EVIDENCE, 7.

VACATION.
Of judgments. See EJECTMENT, 5. MORTGAGES, 7. NEW TRIAL, 3.
Of streets. See MUNICIPAL CORPORATIONS, 11–14.

VALUE. See EMINENT DOMAIN, 4–11. WITNESSES, 4, 5.

VERDICT. See ADVERSE POSSESSION, 13. APPEAL, 11, 12, 14. EMBEZZLEMENT, 2. EVIDENCE, 12. LIBEL AND SLANDER, 19. RAILROADS, 12.

VIEW OF PREMISES. See EMINENT DOMAIN, 8.

WAIVER. See CONTRACTS, 6. CRIMINAL LAW, 12. PLEADING, 10.

WARRANTY. See CONTRACTS, 7, 11, 13. NEGLIGENCE, 12.

WILLS.

Construction: General rules.

1. Every person of mature years and of sound mind may make a will, and having made one, legally, the law, written or unwritten, cannot unmake it or change it by injecting into it something the testator did not intend. *Lichter v. Thiers,* 481

Construction: Title devised.

2. A will devising to a granddaughter of the testator a life estate, remainder to her children and descendants of such, in case there were children or their descendants at the time of her death, with other provisions, stated in the opinion, is *held* to indicate an intention of the testator that the property should not go to strangers of his blood, without choice on his part. *Lichter v. Thiers,* 481

Same: Adopted children.

3. Sec. 4024, Stats. (1898), relating to the status of adopted children, while it may aid in discovering the meaning of a will which is obscure, cannot control or defeat its true construction. *Lichter v. Thiers,* 481

4. Whether or not a will in favor of the children of any particular person means adopted children as well as children of the blood depends upon the intention of the testator, and adopted children may be included or excluded according to circumstances. *Ibid.*

5. A will devising lands for life to a young unmarried granddaughter, remainder to her children or their descendants living at her death, followed in about one month by a codicil devising, in case the granddaughter died childless, the property to testator's relation by marriage, repels the idea that an adopted daughter of the granddaughter is a child within the calls of the will. *Ibid.*

Rights of devisees and legatees: Assignment of estate.

6. The assignment of an estate in the ordinary closing order assigning property according to the terms of a will does not operate to enlarge or abridge the rights of devisees who take by virtue of the will. *Lichter v. Thiers,* 481

WITNESSES.

Compensation: Experts.

1. The statute requiring all persons to obey the subpœna of a court, and fixing their compensation at $1.50 per day, applies to an expert witness, and hence from the mere subpœna and compulsion to testify results no implied contract to pay an expert witness anything in excess of the statutory fees, recognizing, however, that if he does perform work in preparation and qualification at the request of a party, an implied contract for reasonable compensation may arise, and an express contract therefor will be valid. *Philler v. Waukesha County,* 211

2. Liability cannot be imposed upon a county or other governmental subdivision of the state except in accordance with statute law, and hence, in the absence of a statute authorizing counsel for a defendant, charged with homicide, to contract with a physician as a witness for the accused to make preparation to testify as an expert at the county's expense, no liability against the county is created. *Ibid.*

3. In criminal prosecutions an order of the court for compulsory attendance of the accused's witnesses is a necessary prerequisite to the existence of any liability of the county for witness fees therefor, and in an action against the county for the statutory witness fees for attendance upon the trial of a criminal action a complaint which fails to allege such order fails to state a cause of action. *Ibid.*

Competency. See EVIDENCE, 9–11.

Examination.

4. In determining the compensation for land taken by condemnation, objection to the form of a question as to the depreciation in value of the land not taken, "What is the depreciation," etc., instead of "What is the depreciation, if any," etc., is hypercritical and without merit, especially when the objector used the same form of interrogation and several witnesses answered there was no depreciation. *Krier v. Milwaukee Northern R. Co.* 207

5. A question as to the value of land taken by condemnation must call for the value of the land as a portion of the tract of which it forms a part. *Ibid.*

6. A party cannot complain of the form of questions asked witnesses by the adverse party where the questions he asked his own witnesses were of the same nature. *Ibid.*

Cross-examination. See APPEAL, 21. EVIDENCE, 11. TRIAL, 13.

7. In an action against a railroad company for the death of a switch foreman, where the defendant's engineer had testified that his engine could not move at the time the foreman was killed because the air was on and the brakes set, it is not error to admit, on cross-examination, testimony that the engineer had had trouble with that engine five days before, that the engine would not stand still at that time, and that it then had a broken brake hanger. *Keeley v. Great Northern R. Co.* 448

Credibility: Impeachment. See NEW TRIAL, 2. TRIAL, 10–13.

8. If a witness testifies wilfully falsely as to any material matter in the trial of a case, the jury may, if it sees fit, but is not bound to, reject all of such witness's evidence not corroborated by some other credible evidence. *Miller v. State,* 57

WORDS AND PHRASES.

Adverse possession, in statute. See ADVERSE POSSESSION, 19.
Any other building, in statute. See BURGLARY.
Beach. See NAVIGABLE WATERS, 3.
Chief of police, in statute. See MUNICIPAL CORPORATIONS, 9.
Clear preponderance of evidence. See APPEAL, 16.
Equally as good, in contract. See CONTRACTS, 7.
Grant, in statute. See TRUSTS AND TRUSTEES.
Gross negligence. See NEGLIGENCE, 13.
Growing crops, in statute. See TAXATION, 4.
In contemplation of death, in statute. See GIFTS, 2.
Justify their responsibility as required by law, in court order. See EJECTMENT, 2.
Misdemeanor. See MUNICIPAL CORPORATIONS, 4.
Necesssary entries, pleadings, and process in an action according to the practice of the court, in statute. See COSTS, 2.
Necessary litigation or other unavoidable delay, in statute. See TAXATION, 19.

Negligence. See NEGLIGENCE, 1, 4, 5.
Novation. See NOVATION, 1.
Part of a machine or appliance, in statute. See MASTER AND SERVANT, 3, 4.
Paving, in statute. See MUNICIPAL CORPORATIONS, 19.
Possession, in statute. See TAX TITLES, 3.
Public record. See EVIDENCE, 3, 4.
Reasonable doubt. See CRIMINAL LAW, 8.
Shore. See NAVIGABLE WATERS, 3.
Substantial performance. See CONTRACTS, 12.
Uniformity of taxation. See CONSTITUTIONAL LAW, 4.
Vacant and unoccupied, in statute. See TAX TITLES, 1, 3.

J.C.
5/10/10

5783 031

HARVARD LAW